Gichuhi v Republic (Criminal Appeal 85 of 2016)
[2022] KECA 963 (KLR) (26 August 2022) (Judgment)

Neutral citation: [2022] KECA 963 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 85 OF 2016

HM OKWENGU, S OLE KANTAI & A MBOGHOLI-MSAGHA, JJA

AUGUST 26, 2022

BETWEEN

PATRICK KINGORI GICHUHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of (Limo J) in the High Court of Kenya at Kerugoya dated 26th September 2016 in Criminal Case No. 50 of 2015)

JUDGMENT

1. The appellant was charged before the Principal Magistrate's court at Baricho with the offence of defilement contrary to Section 8 (1) (3) of the *Sexual Offences Act*. The particulars were that on the night of 2nd and 3rd May, 2013 at [Particulars Withheld] Township within Kirinyaga County he intentionally and unlawfully caused his penis to penetrate the vagina of GKN, a child aged 15 years. There was an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars were that on the same dates, at the same location he intentionally touched the buttocks, breasts and vagina of GKN, a child aged 15 years with his penis.

2. The appellant denied the offences but following a full trial he was convicted of the main charge and sentenced to 20 years' imprisonment. He appealed to the High Court and in a Judgment dated September 20, 2016his appeal against conviction was dismissed but the sentence was reduced to 15 years' imprisonment, after the learned Judge found that he should have been charged under section 8 (4) of the *Sexual Offences Act*.

3. Dissatisfied with the judgment of the High Court he filed the present appeal. In this appeal he raised five grounds of appeal to the effect that the learned Judge of the High Court: erred in law in failing to re-assess, re-evaluate and re-analyse all the evidence and to appreciate that the evidence did not support the charge or conviction; erred in law in fully relying on incredible evidence adduced by the prosecution

witnesses which evidence was not admissible; erred in law in affirming the appellant's conviction and sentence when the same was founded on inadmissible, inconsistent, contradictory and inconclusive and unreliable evidence; erred in law when he failed to find that the appellant had been tried in a language he did not understand and had not been provided with assistance of an interpreter at all times during the trial; and finally that the Judge erred in law when he failed to give reasons for his decision as required under Section 169 (1) of the *Criminal Procedure Code*

4. The evidence adduced by the prosecution before the trial court was that the appellant is the uncle to the complainant.

   The two had attended a funeral of a relative in Laikipia and thereafter left together. They stopped at Sagana and entered a hotel where the appellant ordered some drinks. The complainant asked for a fanta. Thereafter they headed for [Particulars Withheld] where the appellant lived. She did not know what transpired thereafter, but found herself naked on the following day in the bedroom of the appellant. Her underpant was blood stained and she felt pain on her thighs and genitalia, and suspected she had been defiled. Later both the appellant and the complainant left for Nairobi where she dropped off at Roysambu, and on reaching home informed her mother of what had transpired. She was taken to Nairobi Women's Hospital where she was examined. After about three days, the complainant and her mother went to Sagana Police Station where they made a report and were issued with a P3 form which was later filled. The appellant was subsequently arrested.

5. PW 2 and 3 are the parents of the complainant but their evidence related to what their daughter had told them. PW 4 is Dr Mbai Japhet working with Nairobi Women's Hospital where the complainant was examined by Dr. Kariuki who prepared the medical report. Dr. Mbai produced that medical report because Dr. Kariuki was no longer working with the hospital. He had worked with Dr. Kariuki for 6 to 7 years and was familiar with his handwriting and signature. The report confirmed that the doctor upon examining the complainant observed lacerations to the genitalia, tears to the labia majora, and a missing hymen.

6. PW 5, Denis Senelwa, worked at Kerugoya County Hospital as clinical officer. He testified on behalf of John Mwangi who was also a clinical officer and whom he had worked with for over two years. PW 5 was familiar with the handwriting and signature of John Mwangi. He produced the P3 relating to the complainant filled by Mr. John Mwangi on 8th May,2013. That P3 confirmed that there was penetration.

7. PW 6 PC Philip Kigen from Sagana Police Station is the one who received a report from the complainant on May 7, 2013. After recording the report, he caused the appellant to be arrested.

8. At the close of the prosecution case the appellant was found to have a case to answer and in defence gave a sworn statement and called one witness. He did not deny being with the complainant from Laikipia to Sagana and ending up in his flat in [Particulars Withheld]. He stated that after they arrived, he went to his shop leaving the complainant watching tv and did not return until 9.00 p.m. After a while the complainant retired to sleep and when the appellant also went to sleep, he noticed that the complainant had entered his room locked herself inside forcing him to sleep in the sitting room on the sofa.

9. On the following day they both travelled to Nairobi and he was surprised to be implicated in an offence he did not commit. His witness testified that he saw both appellant and the complainant in the evening before the alleged offence but did not know what transpired in the appellant's flat.

10. In this appeal the appellant was represented by Mr. Gitonga while Mr. Mwangi appeared for the respondent. It was the appellant's submission that the offence was not proved nor was the defence considered, that defilement requires penetration and the report from Nairobi Women's Hospital only

identified sexual assault without any finding of penetration, and that section 124 of the *Evidence Act* requires that in the absence of any corroboration, reasons for believing the complainant must be recorded.

11. On the other hand, the respondent submitted that under Section 361 of the Criminal Procedure Code only issues of law ought to be considered on a second appeal, that the issues raised by counsel for the appellant relate to concurrent findings by the two courts below and the High Court discharged its burden in the analysis of the evidence, and that the correct language of interpretation was used and at no time did the appellant lack interpretation.

12. While agreeing that the High Court considered the evidence, counsel for the appellant in reply stated that the court misapprehended the evidence which is a matter of law. Further, the complainant was not subjected to voire dire.

13. This being the 2nd appeal, we agree that only matters of law call for our consideration 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 that the court acted on wrong principles in making the findings. (see *Karingo vs. Republic* [1982] KLR 219; and *Dzombo Mataza vs. Republic* [2014] eKLR).

14. Three issues raised by the appellant require instant consideration at this stage. First, the appellant was aged 15 years at the time she was defiled, going by her Birth Certificate produced as exhibit 1 before the trial court. She was in a secondary school and in our view she was old enough to understand the purpose of an oath and the need to tell the truth. There was no need for voire dire to be conducted before she was sworn to testify. Secondly, the judgement of the learned judge of the High Court contained sufficient reasons in compliance with section 169(1) of the Criminal Procedure Code. Thirdly, from the proceedings in the record of appeal, starting with the first day the appellant was presented before the Magistrate to take plea, the charge was read to the appellant in the language that he understands.

15. Thereafter at no point in the proceedings did the appellant complain about the language used in court. We also note that throughout the proceedings, the appellant was represented by an advocate, Mr. Thuku, who is recorded to have extensively cross-examined the witnesses. Mr. Thuku did not complain at any stage that his client did not understand the language used or that he needed any interpretation.

16. There are three main ingredients required to prove the offence of defilement. These are, the age of the complainant, proof of penetration and positive identification of the assailant. The age of the complainant in this case was proved by the production of her Birth Certificate, as an Exhibit. According to that certificate, as at the date the offence was committed the complainant was aged 15 years and two months old, and so her age was properly established. In addition, the medical reports produced from Nairobi Women's Hospital and Kerugoya District Hospital leave no doubt that there was sexual assault confirming penetration.

17. The third ingredient is the identification of the assailant. In this case, the appellant was uncle to the complainant who knew him and confirmed that they were together on the date of the alleged offence. The only question that remains is whether or not it is the appellant who sexually assaulted the complainant. The evidence shows that when the complainant and the appellant were in a restaurant at Sagana, there was no other person in their company. When DW2, JM, saw the appellant and the complainant, there was no other person in their company. In the appellant's flat the appellant himself confirmed that no other person had access or was present that night. The irresistible conclusion is that it is the appellant who defiled the complainant. He had the opportunity and used the same to commit the offence.

18. We therefore affirm the concurrent findings of the trial court and the High Court that the appellant is the person who defiled the complainant. We therefore uphold his conviction. The learned Judge of the High Court correctly addressed the issue of age in reducing the sentence from 20 years to 15 years imprisonment and we have no reason to disturb his finding. The end result is that this appeal is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR