Koome v Republic (Criminal Appeal 22 of 2017)
[2022] KECA 1065 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KECA 1065 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 22 OF 2017

W KARANJA, J MOHAMMED & F TUIYOTT, JJA

OCTOBER 7, 2022

BETWEEN

JOHN BUNDI KOOME ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Meru (J. Kiarie Waweru Kiarie, J.) dated 19th December, 2016 in H.C.CR.A. No. 113 of 2015)

JUDGMENT

1. John Bundi Koome, the appellant, has preferred this second appeal challenging his conviction and sentence for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *sexual Offences Act*. He pleaded not guilty to the charges and following a full trial, he was found guilty, convicted and sentenced to life imprisonment on the main charge.

2. Although this is a second appeal and we are, therefore, not too concerned with the facts leading to the conviction, we shall give a brief outline of the matter in order to place this appeal in proper context. The prosecution case before the trial court was that on diverse dates between 23rd August, 2014 and 4th October, 2014 GG, (PW1) a child aged 8 years was at her aunt's place alone playing within the compound. After about 30 minutes, her uncle, the appellant, went and grabbed her covering her mouth and eyes. He took her to the house where he defiled her and threatened her with death if she reported the matter to anyone.

3. The secret was not kept for long as the very following day as the child's mother, PW2, was washing the child's clothes, she noticed the clothes the child wore the previous day were soiled. She enquired from her daughter as to what had happened to her the previous day and also physically examined the child only for her to observe that the child's private parts were swollen and tender with presence of some

bloodstains. After much prodding, the child narrated what the appellant had done to her the previous day and also disclosed that she was threatened with death if she dared tell anyone about the incident.

4. The matter was reported to the police station and the child was also taken to hospital for examination and treatment. Sebarina Kaibathiri (PW4), a Clinical Officer examined the child and noted that her vulva was reddish and the vagina wall was also reddish. There were tears on both left and right labia minora and majora; the hymen was broken and not intact; minimal bleeding was noted. Laboratory investigations were carried out and the ultimate conclusion was that the child had been defiled.

5. The appellant was arrested and arraigned in court as earlier stated. After the close of the prosecution case, the appellant made a sworn statement and promised to avail two witnesses but eventually he did not.

6. In his sworn testimony, the appellant narrated that he knew the complainant as his niece and that she was about 9 years of age. He informed the court that the charge sheet indicated that he defiled the girl in the month of August and October but the mother only mentioned in October. He stated that on that day he left home and went to work leaving his wife and children behind and that he learnt of the allegations against him on 5th October, 2014. He said that the case was a fabrication by his wife and the child's mother and that he was not on good terms with them.

7. The learned trial Magistrate upon assessing and analyzing the evidence tendered before him found the appellant guilty of the offence of defilement, convicted him and sentenced him to life imprisonment.

8. Aggrieved with both the conviction and sentence, the appellant appealed to the High Court. The High Court (Kiarie Waweru Kiarie, J.) in a judgment dated 19th December, 2016 found the appeal to be devoid of merit and dismissed it, provoking the present appeal.

9. In his self-crafted memorandum of appeal filed on 3rd January, 2017, and amended grounds of appeal filed subsequently, the appellant raised grounds, inter alia, that he was convicted on a defective charge sheet; inconsistencies and contradictions in the prosecution case; that no DNA test was carried out on him to connect him with the offence; crucial witnesses were not called and that his defence and mitigation was not considered.

10. The appellant filed lengthy detailed submissions expounding on the above grounds of appeal, but which largely dealt with factual issues, which as stated earlier is outside our ambit on second appeal. When the matter came up for virtual hearing on 28th March, 2022, the appellant adopted his written submissions and made brief oral highlights. He urged us to reconsider his mitigation tendered before the trial court and revise his sentence downwards.

11. The appeal was opposed. Mr. Masila learned counsel for the respondent did not file submissions but he was allowed to make oral submissions. On the issue of the charge sheet being defective, counsel urged that the error in the said charge sheet did not occasion any failure of justice; that the particulars to the offence were clear and not ambiguous and that the error was curable under section 382 of the *Criminal Procedure Code*.

12. On the second issue, he argued that there were no inconsistencies in the evidence by all the prosecution witnesses as they were reliable and consistent, that they corroborated each other on all material aspects and that the prosecution witnesses remained steadfast in cross examination. As regard the DNA test, he argued that section 36(1) of the *Sexual Offences Act* was not couched in mandatory terms and that the case had been proved beyond reasonable doubt.

13. He submitted that they had proved all the ingredients of the offense to wit, the identification of the perpetrator, the act of penetration, the age of the complainant and that the evidence had been put into

consideration by the trial court when delivering its judgment and that there was nothing on which to fault the two courts below.

14. In regard to the sentence, counsel submitted that the trial Magistrate did not have discretion as the sentence to life imprisonment was mandatory and relied on the case of Criminal Appeal No. 5 of 2017, *Hassan Mutwiri vs Republic*. He urged the Court to dismiss the appeal in its entirety.

15. We have considered the record before us, the appellant's grounds of appeal and the submissions of the parties, both written and oral. As stated earlier, our remit in this appeal is restricted to addressing matters of law only. The Court will also not normally interfere with concurrent findings of fact by the two courts below unless such findings are not based on evidence or they are based on a misapprehension of the evidence, or that the courts below acted on wrong principles in making the findings. This Court restated as much in *Karingo vs R* (1982) KLR 213 at p. 219 as follows:-

> " 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 S/O Karanja -vs- R (1950) 17 EACA 146)."

16. Cognizant of the above principles and having read the record and in consideration of the rival arguments therein, the issue falling for determination is whether the ingredients of the offence were established. On this issue, the appellant avers that penetration as an ingredient of the offence of defilement was not established as required by law. He submitted that the complainant did not say that the perpetrator had inserted his penis into her vagina and further submits that the said 'bad manners', the child referred to cannot in any way be construed to mean penetration.

17. Both courts below found penetration had been proved. After considering the evidence of the child, her mother and the medical evidence presented to court, whose contents we set out earlier in extenso, we are satisfied that both courts below arrived at the right conclusion. The medical evidence confirmed the act of penetration, thus collaborating the evidence of the child and her mother.

18. The other ingredient that requires to be proved in a charge of defilement is the identity of the perpetrator. In this case, it is not disputed that the appellant was the child's uncle; they were living in the same neighborhood; the offence was committed in broad daylight and the possibility of mistaken identity does not arise.

19. The age of the minor was also not in contest as it was established to be 9 years by her mother who produced the complainant's birth certificate in court. The first appellate court also held,

> " In her evidence the complainant (PW1) testified that she was 9 years old. This is what FK (PW2) testified to. A certificate of her birth was produced. This fact was not in dispute for the appellant said that the complainant was 9 years."

We agree with the above finding and have no hesitation in concluding that all the technical ingredients required to prove the charge of defilement were demonstrated.

20. On the ground that the charge sheet was defective, the appellant's complaint was that the charge sheet in question states that the incident took place on diverse dates between 23rd day of August, 2014 to 4th October, 2014 which is contrary to the evidence of the child who alleged that the incident took place

on 4th day of October, 2014. This seems to be an issue brought about during the hearing before the Magistrate's Court and the court rendered itself thus;

> " The learned counsel submitted that there was nothing mentioned as having happened in the month of August yet the charge sheet indicated that on the diverse dates between August and October 2014. I am alive to the fact that, by the use of diverse dates shows that the incident happened within that period. In this case, the complainant asserted that the same happened on the 4/10/2104 and the accused was in court and clearly had (sic) her testimony, and so he understood the particulars which were supported by the evidence. No prejudice was occasioned as the accused also gave defence on the issue based on the date mentioned by the complainant, which was on 4/10/2014."

21. On first appeal, the learned Judge considered this issue and pronounced himself as follows:-

> " The charge as contend (sic) by the appellant was wrongly drafted. It ought to read; ... contrary to section 8(1) as read with section 8(2) ..."

The learned Judge however found that the appellant clearly understood the charge leveled against him, he fully participated in the trial and was not prejudiced in any way and that the defect was curable under section 382 of the *Criminal Procedure Code* which provides as hereunder.

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

We agree with the findings of the two courts below on this issue. The defect on the charge sheet was not fatal and did not occasion any injustice to the appellant. We accordingly dismiss that ground of appeal.

22. On whether the prosecution failed to call crucial witnesses to testify, the appellant surprisingly brought this up for the first time in this appeal. Having not been raised before the High court, we cannot deal with it at this point. We nonetheless reiterate that there is no legal provision that the prosecution should call a particular number of witnesses. This is explicitly provided under section 143 of the *Evidence Act* which provides that "no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any act." What matters is that the prosecution calls a number of witnesses that is sufficient to establish their case and they did.

23. On the question of corroboration, we note that the position in law as articulated in section 124 of the *Evidence Act* and section 19 of the *Oaths and Statutory Declarations Act* is that in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful. This position was reiterated by this Court in Criminal Appeal No. 109 of 2014 *Williamson Sowa Mbwanga v Republic* [2016] eKLR,

where the Court held: -

> " The import of the proviso to section 124 of the *Evidence Act* is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this Court in George Kioji V. Republic, CR. APP. NO. 270 of 2012 (Nyeri):
>
> '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...'" [Emphasis Ours]

The above position also lays to rest the appellant's complaint that there was no DNA evidence obtained to corroborate the child's evidence that he was the perpetrator of the offence he was charged with.

24. On whether the appellant's defence was considered by the two courts below, we have gone through the record and are satisfied that his defence was considered but the same did not displace or cast any doubt on the evidence adduced by the prosecution.

25. In relation to sentence, the appellant feels that his mitigation was not given adequate weight. The trial court record shows that the appellant was a first offender, had two children, was an orphan and had two siblings under his care. The court considered that mitigation and found that due to the prevalence of such cases, and the offence carrying a mandatory sentence, the appellant deserved the life imprisonment. The sentence imposed on him was lawful and not unconstitutional as alleged. The sentence of life imprisonment was imposed upon the appellant by the trial magistrate who took into account the appellant's mitigation and the circumstances of the offence.

26. The jury is still out there on whether the sentence of life imprisonment for this kind of offence is mandatory or not in view of the sentencing guidelines issued by the Supreme Court on 6th July, 2022 which stated that the Supreme Court decision in *Francis Karioko Muruatetu vs Republic* [2017] eKLR outlawing the mandatory death sentence as unconstitutional is not applicable to the *Sexual Offences Act*. Be that as it may, we hold the view that the circumstances surrounding this offence justified the life sentence handed down to the appellant. We will not therefore interfere with the said sentence.

27. Ultimately, our conclusion is that this appeal is devoid of merit and we dismiss it in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2022.

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

F. TUIYOTT

I certify that this is a true copy of the original

Signed

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JUDGE OF APPEAL

DEPUTY REGISTRAR