Said v Republic (Criminal Appeal 42 of 2017)
[2022] KECA 1274 (KLR) (18 November 2022) (Judgment)

Neutral citation: [2022] KECA 1274 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 42 OF 2017

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

NOVEMBER 18, 2022

BETWEEN

AMIR ABDULMUIN SAID ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa (A. Ongeri J.) delivered on 15th November 2017 in Mombasa High Court Criminal Appeal No. 108 of 2015 arising from the original trial in Mombasa CM Criminal Case no 2642 of 2012)

JUDGMENT

1. Amir Abdulmuin Said, ('the appellant"), challenges the dismissal of his first appeal by the High Court, which he had lodged against his conviction for the offence of defilement and sentence of life imprisonment that had been imposed by the Senior Resident Magistrate's Court at Mombasa (hereinafter "the trial Court"). The particulars of the offence were that on August 10, 2012, at [Particulars Withheld] area, Mombasa district within Coast province caused his penis to touch the vagina of Z M, a girl aged 11 years. The appellant entered a plea of not guilty in the trial Court, whereupon the prosecution called seven (7) witnesses to testify in the ensuing trial, while the appellant gave sworn testimony and did not call any witnesses.

2. On hearing the appellant's first appeal, the High Court (Ongeri J.) found that the elements of defilement were proved beyond reasonable doubt, and in particular, that the complainant's testimony of the defilement was corroborated by medical evidence; the complainant testified that she knew theappellant prior to the incident, and the age of the complainant was established by the production of her birth certificate. The appellant is aggrieved with these findings, and has in his grounds of appeal and supplementary grounds of appeal filed in this Court, faulted the High Court for supporting the conviction and sentence without considering that the charge of defilement was not proved to the required standard. In particular, that the High Court erred in failing to find that the complainant's

evidence was contradictory; for failing to address its mind properly on the issue of identification of the appellant; by failing to find that the complainant's testimony was corroborated by medical evidence; and by rejecting his defence which was reasonable enough to cast doubt upon the prosecution case.

3. We held virtual hearing of the appeal on July 12, 2022, and the Appellant was in person appearing from Shimo La Tewa Prison, while the respondent was represented by learned prosecution counsel, Mr. Kirui. Both theappellant and Mr. Kirui relied on their respective written submissions filed on July 1, 2022 and, May 25, 2022. We will commence our determination by restating the role of this court as a second appellate court as set out in *Karani v R* [2010] 1 KLR 73 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."

4. The main issue for determination in this appeal is whether the appellant's conviction was upheld on the basis of a proper and legal analysis and evaluation assessment of the evidence. Very briefly the evidence in the trial court was that on August 10, 2012, the complainant (PW2) who was eleven years old, while in the company of her schoolmates PW4 and PW7, was offered a lift from the bus stop by the appellant, who after dropping off PW4 and PW7, took PW2 to his house undressed her and inserted his 'thing for urinating into her place for urinating'. PW2 told her mother (PW1) and cousin (PW5) about the incident three days later, who accompanied PW2 to the house where the incident had happened, did not find the Appellant's there, and they later found him at his house reported the matter to the police station. There statements were thereupon taken by PW6 who was the investigating officer, and the complainant was thereafter taken to and examined by PW3 a medical doctor at Coast General Hospital, who filled a P3 form that he produced during the trial.

5. The appellant's submissions are firstly, that his right to a fair trial under article 50 of the *Constitution* included the right to an identification parade prior to being charged under the procedure was set down in the Kenya Police Force Standing Orders, and that without proper identification of a suspect who later becomes an accused person, there cannot be a proper conviction. Reliance was placed on the decision in *Oluoch v Republic* (1985) KLR 549 that a dock identification of an accused person is almost worthless.

6. According to the appellant, the police did not conduct an identification parade, yet the question before the trialcourt was whether theappellant was the one who defiled the complainant. Further, that the complainant (PW2), PW3 and PW4 stated in their testimony that the incident occurred when they were waiting to board a matatu to go home from school during the day time, and that they did not know the appellant before the material day. However that PW2 later stated that the appellant was an immediate neighbor, and that PW2, PW3 and PW4 did not point out the Appellant to the police as the alleged perpetrator. Therefore, that the disparities cast reasonable doubt on the veracity of the evidence on identification, the identification of the Appellant was that of a stranger and based on visual identification, and was insufficient for court to form an opinion that the complainant properly identified the appellant without the aid of an identification parade. Reliance was placed on the decisions in *Cleophas Otieno Wamunga v Rep* (1989) KLR 424 and in *Wafula and 3 others v Republic*.

7. Secondly, on whether the prosecution had proved its case beyond reasonable doubt, theappellant drew court's attention to the case of *Jacob Odhiambo Omuombo v Rep* Cr App No 28 of 2008 (Kisumu)

where it was held that penetration was a key ingredient for the offence of defilement and must therefore be satisfactorily proved. The appellant submitted that the trial Court relied on the evidence of defilement by the victim, and from the medical evidence of PW3 as well as the P3 form, other than noting the absence of the hymen and that it was not freshly perforated, there was no opinion or conclusion made as to when the complainant was defiled. The appellant submitted that it was trite law that under the provisions of section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim alone as held in *Mohamed v Republic* (2008) KLR (G & F) 1175, however that for the court to do so, it must first believe or be satisfied that the victim was telling the truth and secondly it must record the reason for such belief.

8. That in the present case, in accepting that the complainant had been defiled, the High Court merely stated in its judgment that the complainant's testimony was corroborated by the medical evidence and her hymen was not intact, and ought to have subjected the evidence to fresh and exhaustive examination He placed reliance on *Arthur Mshila Manga v Rep*. [2016] eKLR it was held that where the medical evidence having failed to confirm that the victim was defiled, the only other evidence of defilement was that of victim herself, and that the prosecution failed to produce the first report of the offence to confirm that it pointed to the appellant. Therefore, that the case was not proved to the required standard of law.

9. Mr. Kirui on his placed reliance on the case of *John Mutua Munyoki v Republic* [2017] eKLR which set out the elements of defilement, to submit that the victim was eleven (11) years old as evidenced by the birth certificate produced by the victim's mother; penetration was proved by the victim when she narrated what had happened, which was reiterated during cross examination and was corroborated by PW3 who stated that the hymen was not intact and who produced the P3 form; the victim positively identified the appellant as the one who defiled her and further evidence of positive identification was that the appellant carried PW2, PW4 and another minor in his car, who testified that they left the victim with the appellant. Reference was made to section 124 of the *Evidence Act* which provided that in cases of sexual offences the Court could convict on the evidence of a child even if there was no corroboration.

10. The counsel further submitted that the alleged contradictions were immaterial, and that the defence never marked or produced the statements as a defence exhibit for the trial court and High Court to peruse and arrive at a determination thereon. On sentence, it was asserted that it was legal as set out in the provisions section 8 (1) and (2) of the *Sexual Offence Act* and the Court exercised its judicial discretion and considered the mitigation by the Appellant.

11. We start our consideration by reiterating the holding by this court in *John Mutua Munyoki v 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.

12. It is not in dispute that the complainant's age was ascertained by a birth certificate produced by PW1 showing the complainant's date of birth to be August 8, 2001. It is also notable that PW2's evidence was both of the date of penetration which she testified to be August 10, 2012, and of the act of the said penetration which she described in detail, and her sole evidence was in this regard sufficient under section 124 of the *Evidence Act*. The High Court did not err in finding that the trial court properly

relied on the said section, and in this regard the trial court detailed the reasons why it found PW2's evidence to be truthful. The medical evidence of PW3 in the circumstances merely corroborated the evidence already given by PW2 as to when and how the defilement occurred.

13. On identification of the perpetrator of the offence, thiscourt (Omolo, Bosire & O'Kubasu JJ.A) set the requirements for a positive identification in *Francis Kariuki Njiru & 7 others v Republic* [2001] eKLR, which are that the identification should be free from error considering all the surrounding circumstances. In the present appeal, the evidence as regards identification of the perpetrator of the offence was that on the material date, the appellant introduced himself to PW2 as the father of Farouk and a neighbour and offered PW2 a lift. PW4 and PW7 were present when this happened and were also given a lift by the appellant, and left him with PW2 in the car when they alighted. PW2 was specific on cross examination that the appellant then took her to his house at 1.00pm on the material date and they left the house at 4.00pm.

14. On the following day, PW2 again saw theappellant at the water point, when he asked her to return to the house they had been and she refused. On the third day after PW2 told her mother of the incident, PW1 and PW2 went to theappellant's house where they found the appellant and his car. This was thus a case of recognition, theappellant having been previously seen in broad daylight for considerable periods of time and on three different occasions by the complainant. The High Court therefore did not err in finding that the appellant was previously known to PW2, and that there was positive identification in the circumstances.

15. In addition, there was therefore no need for an identification parade in the circumstances, as explained by this court in *Hassan Kahindi Katana Alias Kinungu & another v Republic,* Malindi Criminal Appeal No 8 of 2019 as follows:

> " It is also notable that an identification parade is not necessary where the witness is positively confident at the time of commission of the crime as to the identity of the perpetrator of the offence, and will only become necessary where the victim of the crime did not know the accused before his acquaintance with him during the commission of the offence, or identification was made under difficult circumstances such that the witness may have made a mistake. See the decisions of this court in *Kinyanjui & 2 others v Republic* (1989) KLR 60, *Samuel Kilonzo Musau v Republic* (2014) e KLR: and *Andrea Nahashon Mwarisha v Republic* [2018] eKLR."

16. The appellant in his defence confirmed giving the complainant a lift on the material day and that she was present in the house where he took the gas, but denied defiling her. This defence was considered and dismissed by the High Court, and rightly so, as it did not raise any doubts on the account of events given by the complainant. Lastly, on the sentence imposed of life imprisonment, this court can only address the legality of the sentence and not its severity. It is notable that under section 8(2) of the *Sexual Offences Act*, there is a mandatory minimum sentence of life imprisonment for conviction for defiling a child aged eleven years or less. The sentence imposed on the appellant by the trial court was a therefore legally sound and the High Court did not err in upholding it.

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

18. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 18TTH DAY OF NOVEMBER, 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