Nzili v Republic (Criminal Appeal 13 of 2019)
[2021] KECA 164 (KLR) (19 November 2021) (Judgment)

Neutral citation: [2021] KECA 164 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 13 OF 2019

F SICHALE, S OLE KANTAI & SG KAIRU, JJA

NOVEMBER 19, 2021

BETWEEN

JOHN GACHOKA NZILI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of the High Court of Kenya at Mombasa (A. Ndung'u, J) dated 28th October, 2016 in Criminal Case NO. 268 of 20144)

JUDGMENT

1. The appellant, John Gacoki Nzilu 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 15th March, 2014 in Kisauni Sub-County within Mombasa County, he intentionally caused his penis to penetrate the vagina of HS (name withheld), a child aged 1 year and 9 months.

2. There was an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No.3 of 2016. The particulars of the alternative charge were that on the 15th March, 2014, at the same place, he intentionally touched the vagina of HS.

3. The appellant denied the charges and in a judgment rendered on 28th October, 2016, Hon. A. Ndungu, the then Resident Magistrate, Shanzu Law Courts found him guilty of the main count. The appellant was sentenced to serve life imprisonment.

4. Undeterred, the appellant filed an appeal against conviction and sentence at the High Court of Kenya at Mombasa. On 16th August,2018, Njoki Mwangi, J dismissed the appellant's appeal. Aggrieved by the said outcome, the appellant has now filed the appeal before us.

5. On 12th May, 2021, the appeal came up before us for plenary hearing. Mr. Mulisho, learned counsel appeared for the appellant whilst Mr. Jami appeared for the State. Mr. Mulisho informed us that he

would fully rely on his submissions dated 17th December, 2020 whilst Mr. Jami wholly relied on his submissions filed on 8thJanuary, 2021.

6. In the appellant's aforesaid submissions, and whereas the appellant had listed 7 grounds of appeal in his Memorandum of Appeal, the appellant chose to mainly rely on ground 6 of the Memorandum of Appeal challenging the circumstantial evidence. It was submitted that no one saw the appellant defiling the complainant and that no one saw the appellant enter his house where the complainant was defiled.

7. Further, it was submitted that the two other children who were with the complainant were not called as witnesses so as to establish at what point they parted with the complainant. In conclusion, the appellant contended that it is possible that one of the two children the complainant was playing with or any other tenant, given that the appellant lived in a block of apartments, defiled the complainant.

8. In opposing the appeal, the State in its submissions contended that the conviction and sentence were properly founded as the evidence of the complainant was direct and required no corroboration.

9. We have considered the record, the grounds of appeal, the rival written submissions, the authorities cited and the law.

10. The appeal before us is a second appeal. Our mandate as a second appellate court is as stipulated in Section 361(I)(a) of the *Criminal Procedure Code*. It provides:

" 361 (I) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

11. In so far as case law is concerned, the decision of *David Njoroge Macharia vs. Republic [2011] eKLR* sums up the said mandate. In the said decision, it was stated:

> " Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (see also *Chemagong vs. Republic* [1984] KLR 213)."
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> Similarly, in *Kaingo versus Republic* [1982] KLR 213 it was

held 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 Karoti S/O Karanja versus Republic* [1956 17 EALA 146]."

12. In our view, the facts of the case are fairly straight forward. The appellant lived in a block of flats together with other tenants. On 15th March, 2011, the complainant was outside this block of flats playing with two other children. Her mother (P.W.1) was washing clothes outside the block of flats, when she saw her child emerging out of the appellant's house carrying her pant whilst crying. The

appellant was standing at the door of his flat combing his hair. P.W.1 examined the complainant and found that her clothes were blood stained. The complainant was taken to hospital. P.W.2, Dr. Mohammed produced the P.3 and the degree of injury was classified as "main". The complainant's vagina was found to have been bruised and there was evidence of bleeding due to a tear.

13. In our view, the evidence against the appellant was overwhelming. Section 124 of the *Evidence Act* does not require the evidence of a victim of a sexual offence to be corroborated. It states:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act (Cap.15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

14. We find that the conviction was proper.

15. As regards sentence, when the appellant was asked whether he had anything to say, it is recorded that he stated: "I have no mitigation".

16. In meting out sentence, the trial court noted:

> "The court has considered that the accused is a first offender. The accused has no mitigation. It is unfortunate that the accused does not seem remorseful. The court has considered the circumstances of the offence and afraid there aggravating circumstances going by the age of the victim and extent of injuries sustained by the toddler. The sentence should act as deterrence. Accused is sentenced to serve life imprisonment."

16. It is our further considered view that the sentence was lawful, given the heinous act committed by the appellant to a child of 1 year and 9 months.

17. The appellant's appeal is hereby dismissed.

18. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

S. GATEMBU KAIRU, FCIARB

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR