Ngao v Republic (Criminal Appeal 5 of 2020)
[2021] KECA 154 (KLR) (19 November 2021) (Judgment)

Neutral citation: [2021] KECA 154 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 5 OF 2020

W KARANJA, DK MUSINGA & SG KAIRU, JJA

NOVEMBER 19, 2021

BETWEEN

ONESMUS SAFARI NGAO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 23rd December, 2019 in Criminal Appeal No. 79 of 2018)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8 (1) (4) (sic) of the *Sexual Offences Act*. The particulars of the offence were that on the 20th day of November 2015 at Watamu Township within Kilifi County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of GST, a child aged 15 years. The appellant also faced a second count of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, the particulars of the offence being that on the material day he indecently touched the complainant's vagina.

   After a full trial, although the evidence adduced clearly established that the appellant defiled the complainant, the trial court convicted the appellant of the second count and sentenced him to 10 years' imprisonment.

2. Being dissatisfied with the said conviction and sentence, the appellant preferred an appeal to the High Court, which was unsuccessful. He then moved to this Court on a second appeal.

3. Before we consider the grounds of appeal, we shall briefly summarize the evidence that led to the appellant's conviction and sentence.

4. The complainant, GST (PW1) testified that on the material day, together with other school mates and the appellant they travelled to Watamu for Taekwondo competition. The competition ended at around 8.00 pm and the appellant booked them at a certain guest house for the night. In the room she was with another girl, RM. In the course of the night the electric light in the room was switched on and the complainant realized that her colleague was not there and she saw the appellant climbing into her bed. He requested to have sexual intercourse with the complainant but she refused. A struggle ensued and the appellant overpowered the complainant and defiled her. The appellant threatened dire consequences upon the complainant if she ever reported the incident. After a few days the complainant told the appellant that she had missed her monthly periods.

5. The complainant further testified that on 9th January 2015, together with other pupils and the appellant they travelled to Nairobi to participate in another Taekwondo tournament. On their way back, the appellant took her to his house at Kilifi where he defiled her again and thereafter gave her a certain tablet to swallow, which she did. The appellant also took her to see a certain woman in Mombasa who gave her a black concoction which she drank. Thereafter she experienced heavy bleeding that resulted in her hospitalization.

6. Disturbed by all these events, upon her return to school she confided in her class teacher, PW2, about her ordeal. In turn PW2 reported the incident to the headteacher who made a report to the police at Mtwapa Police Station. Subsequently the appellant was arrested.

7. The complainant's evidence regarding her defilement was corroborated by PW7, a clinical officer, who testified that upon examination of the complainant he found her hymen missing and there was evidence that she had conceived.

8. PW5, a committee member at the school where the complainant was a pupil, testified that on 8th February, 2016 they had a meeting where the issue of sexual abuse of the complainant by the appellant was discussed and the complainant narrated to the committee the ordeal she had suffered at the hands of the appellant.

9. PW8, the investigating officer, told the court how she investigated the matter and produced the P3 Form and the complainant's hospital discharge summary.

10. In his defence, the appellant denied having defiled the complainant. He however admitted having accompanied the complainant and other pupils to the Taekwondo tournament at Watamu, and further conceded that he was booked at an adjacent room to the one he had booked for the complainant and her school mate.

11. In his memorandum of appeal, the appellant faulted the first appellate court for upholding his conviction in the absence of certified copies of the P3 Form and the hospital discharge summary. He further stated that the age of the complainant's injuries did not conform to the alleged date of the commission of the offence; that section 11 (1) of the *Sexual Offences Act* contradicts section 216 and 329 of the *Criminal Procedure Code* which grants court discretion in sentencing; and that Mtwapa Police Station had no jurisdiction to prosecute an offence that was allegedly committed at Watamu.

12. The appellant filed written submissions where he argued the aforesaid grounds of appeal.

13. Mr. Alenga, Prosecution Counsel, opposed the appeal and filed written submissions as well. He urged this Court to find that there was sufficient evidence to warrant the upholding for the appellant's conviction as well as the sentence. In his view, the appellant should have been convicted of defilement because there was sufficient evidence to warrant such conviction. That notwithstanding, the respondent did not challenge the conviction and the sentence as passed by the trial court. However,

the first appellate court held that the offence of defilement had been proved, but other than so stating did not disturb the trial court's findings.

14. We have considered the record of appeal and the appellant's submissions as well as the submissions made by the respondent.

15. On a charge of defilement, the prosecution must adduce sufficient evidence in proof of the apparent age of the complainant; identification of the accused; and penetration of the complainant's genital organ by the accused. See *George Opondo Olunga vs Republic [2016] eKLR*.

16. In this appeal the age of the complainant was proved by production of her birth certificate, P Exhibit 2. The complainant was born on 10th October 2000 and therefore at the time of commission of the offence she was just over 15 years old.

17. Regarding identification, the appellant was well known to the complainant as he was her teacher. There was sufficient evidence that on the night of 20th November 2015 the room in which the complainant was sleeping was well lit and she was able to see the appellant clearly. The appellant engaged her in a conversation and she was able to recognize him.

18. Regarding penetration, the complainant's evidence was clear that she was defiled at least twice by the appellant. The evidence of PW7, who testified on behalf of the Medical Officer who examined the complainant and produced the P3 Form, showed that the complainant's hymen was missing and there was also evidence of recent conception. The trial magistrate was satisfied that the complainant was truthful. In our view, therefore, all the necessary ingredients that required proof on a charge of defilement were satisfied.

19. Turning briefly to the appellant's grounds of appeal, we do not find any basis for faulting the conviction on the ground that the P3 Form and the hospital discharge summary were not certified. The documents that were produced before the trial court were original and did not require any certification. The P3 Form showed that the offence was reported to the police on 25th February 2016 and the complainant was referred to Kilifi District Hospital on 14th April 2016. The P3 Form was filled on 15th April 2016. All these took place a few months after commission of the offence on 20th November 2015. There is therefore no material inconsistency regarding the dates.

20. Regarding the issue of exercise of discretion in sentencing, on 6th July 2021 the Supreme Court in *Francis Karioko Muruatetu and Another vs Republic [2021] eKLR* gave some guidelines to the effect that the Muruatetu case cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. The implication thereof is that upon conviction, courts must pass the mandatory sentences that are prescribed under the *Sexual Offences Act*. We have already stated that the appellant ought to have been convicted for defilement, in which event he would have been sentenced to a jail term of not less than fifteen years as prescribed under section 8 (4) of the *Sexual Offences Act*. Considering that the respondent did not challenge the trial court's findings on conviction and sentence, we shall not interfere with the same.

21. Lastly, regarding the jurisdiction of Police officers from Mtwapa Police Station to prosecute an offence that was committed at Watamu, we wish to point out that the prosecution was not conducted by the police. It was done by the Directorate of Public Prosecutions but police officers from Mtwapa Police Station testified. Police officers can testify before any court, irrespective of their work station. This ground is without any merit.

22. All in all, we find no merit in this appeal and dismiss it in its entirety.

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

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR