Kinyaga v Republic (Criminal Appeal 10 of 2016)
[2021] KECA 220 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 220 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 10 OF 2016

DK MUSINGA, RN NAMBUYE & S OLE KANTAI, JJA

DECEMBER 3, 2021

BETWEEN

KUNONA KINYAGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from Judgement of the High Court of Kenya at Nanyuki, (Kasango, J.) dated 14th April 2016 in HC Cr. Appeal No. 50 of 2015)

JUDGMENT

1. Kunona Kinyaga, the appellant, was charged with the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between 1st July 2013 and 31st July 2013 at [Particulars withheld] area in (Particulars withheld] village, within Laikipia North District in Laikipia County, the appellant intentionally and unlawfully caused his male genital organ to penetrate the female genital organ of the IJ (PW1) [Name withheld], a girl aged 15 years.

2. In the alternative, he was charged with the offence of committing an indecent act contrary to section 6 (a) of the *Sexual Offences Act* No. 3 of 2006. However, the prosecution withdrew this charge against the appellant pursuant to section 87 (a) of the *Criminal Procedure Code*.

3. The trial magistrate after considering the evidence from the prosecution and the defence by the appellant found the appellant guilty, convicted and sentenced him to 20 years' imprisonment. The appellant was dissatisfied with the decision of the trial magistrate and appealed to the High Court. The first appellate court (Kasango, J.) agreed with the finding and decision of the trial magistrate and dismissed the first appeal.

4. A summary of the facts is that sometime in the month of October 2012, the appellant, who was a motor bike rider, approached IJ and requested her to be his girlfriend. IJ initially turned down the request but later accepted to become the appellant's girlfriend after the appellant promised to marry her once she

completed her primary school education. The complainant was then a standard 8 pupil. The appellant used to visit the home of IJ at night and the two would engage in clandestine sexual intercourse up to the month of August 2013 when IJ missed her monthly periods. Upon learning that she was pregnant, IJ informed the appellant's mother, who asked her to inform the appellant of this fact. Sometimes in the month of September 2013, the appellant took IJ to a clinic at Sagana where she met a man who gave her three tablets which she was asked to swallow. Unbeknown to IJ, the tablets were to assist her in aborting the foetus already in her womb.

IJ stayed at the clinic for several days while experiencing heavy bleeding and on 13th September 2012, the appellant took her home.

5. On the next day, IJ in the company of her father and her school head teacher, (PW4), reported the matter at Doldol Police Station where she was given a P3 Form and referred to the hospital for clinical examination. Kenneth Kiprop, (PW3), a Clinical Officer attached to the Doldol Sub-District Hospital examined IJ. He observed that her underpants and genitalia had blood stains. The pregnancy test administered was positive and according to PW3, a pregnancy test could still be positive even ten days after an abortion or delivery because the hormones are still present in the blood and urine. The cervix of IJ was 4 centimeters dilated, which according to PW3 meant that something had come out of the uterus and thereby confirming that abortion had been procured.

6. PC Peter Murunga, (PW7), a Police Officer stationed at Doldol Police Station, arrested the appellant and presented him before the trial court to answer to the charge of defilement contrary to section 8(1)(3) of the *Sexual Offences Act*, No. 3 of 2006.

7. The appellant gave unsworn evidence in which he denied committing the offence he was charged with. In his defence, the appellant stated that there existed a grudge between his parents and the parents of IJ over ownership of some livestock and that was what could have motivated the charge against him. The appellant further stated that the parents of IJ did not testify before the trial court and urged the trial court to find that the prosecution had not proved its case to the required standard.

8. The appellant called two witnesses. Richard Nangonye, (DW2), who testified that he was with the appellant on the day he is alleged to have taken IJ to procure an abortion. He added that the appellant was well disciplined and did not defile IJ. David Shilanalai Salaton, (DW3), testified that the appellant was a good man.

9. On his second appeal to this Court, the appellant relies on his grounds of appeal filed on 4th May 2016 and supplementary grounds filed on 1st October 2021. The grounds are that the learned judge erred in failing to appreciate that the prosecution evidence was marred with a lot of doubts and discrepancies; in upholding the appellant's conviction based on the evidence of abortion whereas the doctor who allegedly carried out the abortion did not testify; in failing to find that the evidence of IJ was not corroborated as required by law; in failing to find that the provisions of section 214 (i) and 214 (iii) of the Criminal Procedure Code were violated; in failing to find that the provisions of sections 150 and 151 of the Criminal Procedure Code were violated thereby amounting to an unfair trial of the appellant contrary to Article 50 of the Constitution.

10. During the hearing of the appeal the appellant was unrepresented, while the respondent was represented by Mr. Wanjohi, learned Prosecution Counsel. In urging this appeal, the appellant sought to rely wholly on his written submissions.

11. In his written submissions, the appellant submitted that all the prosecution witnesses testified to the offence of abortion and not defilement, whereas he was on trial for the offence of defilement. He therefore argued that his conviction on the offence of defilement was improper since the evidence

tendered on record was about the offence of abortion and not defilement. The appellant also challenged the failure by the prosecution to present before the trial court as witnesses the girls who used to stay together with the complainant and who were allegedly always present whenever the appellant visited the home of I.J on different nights and had sexual intercourse with her. According to the appellant, these girls could have corroborated the evidence of IJ that indeed she had sexual intercourse with the appellant. The appellant also took the view that the failure by the trial court to call as a witness the person who allegedly assisted IJ to procure an abortion violated the provisions of section 150 of the Criminal Procedure Code. Additionally, that not all witnesses were sworn before giving their testimony before the trial court and thereby violating section 151 of the Criminal Procedure Code. In sum, the appellant urged us to find that he was not positively identified as the person who defiled IJ and that there was an unfair trial and accordingly make orders setting aside his conviction.

12. On his part, Mr. Wanjohi, in highlighting the respondent's written submissions dated 29th September 2021 urged us to find that the ingredients of the offence of defilement as laid down in the case of *Kyalo Kioko v. Republic [2016] eKLR* had been proved to the required standard. He testified that the prosecution was able to prove that IJ was 15 years old when she was defiled by the appellant; that there was penetration which resulted in IJ becoming pregnant; and that it was the fruit of the conception which the appellant sought to destroy when he took IJ to procure an abortion.

13. On the issue of identification, the learned prosecution counsel argued that the appellant was well known to IJ and that the defilement took place on diverse dates and therefore there was no room for mistaken identity. On the issue of failure by the prosecution to call certain witnesses, learned prosecution counsel argued that the law did not have requirement of a particular number of witnesses that are required to prove a particular fact. He relied on the case of *Alex Lichodo v. R [2006] eKLR*, where this Court held that whether a witness should be called by the prosecution is a matter within their discretion and an appellate court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.

14. The obligations of this Court in a second appeal are by dint of section 361 of the Criminal Procedure Code confined to matters of law only. In *Karingo v. Republic [1982] KLR 213*, this Court stated thus:

> "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 C/O Karanja vs. R (1956) 17 EACA 146.*"

15. The issue that we must determine is whether the key ingredients for the offence of defilement, that is, age of the victim, penetration and the identity of the offender were proved beyond any reasonable doubt to sustain a conviction.

16. IJ testified that the appellant approached her to be his girlfriend sometime in October 2012; that although she had initially turned down this request, she later accepted to become the appellant's girlfriend after the appellant promised to marry her after she had completed her schooling. The appellant would thereafter visit the homestead of IJ at night where the two would engage in sexual intercourse. This continued up to the month of August 2013 when the appellant became pregnant. The record reveals that the appellant was well known to IJ. We are of the opinion as were the two courts below that the evidence of IJ is consistent with the evidence produced by Kenneth Kiprop (PW3), a Clinical Officer based at the Doldol Sub-District Hospital. The evidence of PW3 confirmed that there was penetration of the genital organs of IJ. The pregnancy test conducted on IJ which turned positive as well as the fact that the cervix of IJ was 4 centimeters dilated was sufficient confirmation that sexual intercourse had taken place.

17. As regards the issue of identification, IJ identified the appellant as the perpetrator of the offence. There was no possibility of IJ being mistaken in her identification of the appellant as this was a person well known to her, and apparently the violation was repeated severally. Although the appellant argued that the girls who were present in the homestead of IJ when he is alleged to have numerously visited IJ and had sexual intercourse with her should have been called to testify and corroborate the testimony of IJ, we nonetheless find that the trial magistrate believed and accepted the evidence of IJ as truthful. This was consistent with section 124 of the *Evidence Act* which though requiring corroboration of the evidence of victims of a criminal offence, has a proviso regarding victims under the *Sexual Offences Act* as follows:

> " 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."

18. This Court in the case *Williamson Sowa Mbwanga v Republic [2016] eKLR*, stated thus:

> " 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..."

19. The failure by the prosecution to call the girls who were allegedly in the house when the appellant numerously visited IJ was not prejudicial to the appellant. We concur with the first appellate court that the appellant did not rebut the evidence of IJ during cross examination that he numerously used to visit her house and had sexual intercourse with her. The appellant cannot purport to discredit the evidence of IJ at this stage whereas he failed to take up that opportunity before the trial court during his cross examination of IJ. The evidence of IJ was sufficient and convincing and there was no need for the prosecution to call any more witnesses including the person who assisted IJ to procure an abortion. This Court in the case of Alex Lichua Lichodo (supra) reiterated its earlier findings in *Julius Kalewa Mutunga v. Republic - Criminal Appeal No. 31 of 2005*, that:

> " ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

20. The trial court as well as the first appellate court were convinced by the evidence on record that the appellant is the person who defiled IJ. We are satisfied that the appellant was well identified as the person who defiled the complainant.

21. As regards the age of IJ, in *Hadson Ali Mwachongo vs. Republic [2016] eKLR*, the Court stated as follows:

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient in the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim."

22. In *Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000* it was held:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by a birth certificate, the victim's parents or guardian and by observation and common sense..."

23. In the present case, while testifying before the trial court, IJ stated that she was 15 years old at the time. Kenneth Kiprop (PW3), a Clinical Officer told the trial court that IJ was 15 years old at the time he examined her. PC Peter Murunga who testified as PW7 produced the birth certificate of IJ before the trial court. The appellant did not cross-examine any of these witnesses on the issue of age and we therefore find that the age of IJ was not challenged at all, and we have no reason to doubt and/or interfere with the finding of the first appellate court on this issue.

24. A different ground of appeal raised by the appellant was that the learned judge of the first appellate court erred in law in upholding his conviction and sentence whereas Priscah Morgan, (PW4), was not examined upon an oath as required by section 151 of the Criminal Procedure Code which states that:

> " Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath."

25. We have examined the record of the trial court and note that the same is silent on whether PW4 was sworn as a witness before giving her testimony. That was a breach of the provisions of section 151 of the Criminal Procedure Code. However, and without prejudice to the foregoing, we are of the opinion that the failure to administer an oath upon PW4 before she testified did not per se occasion any prejudice to the appellant as to warrant our interference with his conviction and sentence. Even in the absence of the evidence of PW4, we are satisfied that the evidence tendered by the other prosecution witnesses was sufficient to sustain the charge of defilement against the appellant.

26. We come to the conclusion that there was sufficient evidence in support of the concurrent findings of the two lower courts and that the learned judge of the first appellate court did not err in upholding the conviction and sentence of the appellant for the offence of defilement. Accordingly, we find no merit in this appeal. It is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

D. K. MUSINGA, (P).

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

S. Ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR