



**Gathiga v Republic (Criminal Appeal 31 of 2017)
[2024] KEHC 8210 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL 31 OF 2017
JK NG'ARNG'AR, J
JUNE 26, 2024**

BETWEEN

ISAAK KINYANJUI GATHIGA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the conviction and sentence of the Chief Magistrate's Court
at Kiambu (J. Kituku, PM.) delivered in CMCC (SO) No. 2532 of 2014)*

JUDGMENT

1. The appellant Isaak Kinyanjui Gathiga was charged with the offence of defilement of a child contrary to section 8 of the *Sexual Offences Act*.
2. When the appellant was arraigned before the trial court, he pleaded not guilty to the offence. After full trial, the appellant was convicted of the offence and sentenced to life imprisonment.
3. The appellant is aggrieved with those findings. He filed a petition of appeal dated 23rd December 2015 and an undated memorandum of appeal that raised five grounds disputing the findings of the trial magistrate. I have taken the liberty to summarize those grounds as follows: that the evidence adduced by the prosecution was marred with inconsistencies, dubiousness, contradictions and not weighty as to sustain a conviction; that as a consequence, the prosecution failed to discharge its burden of proof to the required standard; and that section 169 (1) of the *Criminal Procedure Code* had not been complied with. In the circumstances, the appellant prayed that the appeal be allowed by quashing the conviction and setting aside the sentence.
4. The appeal was heard on the basis of the parties rival written submissions. However as at the time of writing this judgment, I was yet to be impressed with the respondent's submissions. According to the appellant in his written submissions dated May 2024 (*sic*) and filed on 31st May, 2024, his constitutional rights were violated as he was only apprehended three months after the offence was committed; yet



- the complainant and appellant lived in the same vicinity. He further lamented that his constitutional rights to a fair trial were infringed since he was not informed of his right to legal representation, to be furnished with the prosecution's evidence in advance, to defend and to challenge the evidence of the prosecution. That as a result, he failed to exhaustively cross examine the prosecution witnesses.
5. The appellant continued that the charges preferred against him were not known in law since the last amendment of the charge sheet was done orally. That the same was done bereft of any tangible disclosures. He supported this argument from the observations of the court's opening paragraph in its judgment. He observed that since the evidence was not marked for identification, then nothing tied him to the offence that he was charged with and culminated to a conviction. Additionally, the affidavit was inadmissible as it was not attested to.
 6. On whether the ingredients to a charge of defilement had been proved to the required standard, the appellant submitted that the element of penetration had not been established beyond reasonable doubt. According to him, there were major discrepancies with the evidence of PW5 compared to that of PW6. On his identification as the perpetrator, the appellant submitted that the evidence was too weak as to conclude in the affirmative. On the victim's age, he submitted that the evidence was unsubstantiated. He complained that his defence was cogent and was improperly dismissed. Finally, on sentencing, the appellant submitted that the same was harsh, severe, disproportionate and illegal and contradicted recent jurisprudential pronouncements.
 7. I have considered the record at trial and the rival submissions, examined the evidence and analyzed the law. As a first appellate court, this court's duty is to reconsider and re-evaluate the evidence before the trial court afresh in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect. [See *Selle & Another v Associated Motor Boat Co Ltd & others* [1968] EA 123].
 8. The appellant entered a plea of not guilty on 5th August 2014 after the substance of the charges and every element had been explained to him by the court. This paved way for hearing of the prosecution's case that took off on 19th November 2014.
 9. PW1 FS the complainant, a pupil at [particulars withheld] Nursery School, testified that on the evening of 13th April 2014, she was playing with her sisters when the appellant called her. He lured PW1 to the river by telling her to go with him to the river and assist him look for money that he had lost there. They proceeded to that direction and on reaching the napier grass plantation, the appellant ordered the complainant to remove her clothes. He then removed his clothes and sexually assaulted the complainant. During the ordeal, the appellant placed his shirt over her mouth so that she would not scream. Thereafter, the appellant commanded the complainant to sleep on her stomach where he sexually defiled her through her anus. She felt pain throughout the entire incident. After he was done, he asked PW1 to dress up. He then escorted her home. She added that her clothes were muddy since she lay on top of them. When cross examined, PW1 maintained that she was telling the truth.
 10. On arriving home, PW1 informed her mother PW2 LM about the ordeal. She was crying when she was informing PW2 what had transpired. PW2 further observed that PW1 was muddy and wet. PW2 took a look at the complainant's private parts and discovered that she was bruised on her vagina and anus. Furthermore, she had remnants of semen on both parts. PW2 then told her husband PW3 AK what the complainant underwent.
 11. PW2 took PW1 to [particulars withheld] Sub District Hospital where she received immediate treatment. She was however referred to Kiambu District Hospital where they went the following day after sleeping at [particulars withheld] Sub District Hospital. PW1 received further treatment herein



- and was discharged. PW2 recognized the appellant as their neighbor. She knew of him since 1997. When cross examined, PW2 maintained that she held no grudge against the appellant.
12. PW3 recalled that during the investigations, the appellant went into hiding for about three or four months. He was later on arrested in July of that year. PW3 discovered that the appellant had escaped to go live with his friends. He stated that he had never disagreed with the appellant. When he was traced, PW1 positively identified that it was him that had sexually assaulted her. PW3 reported the matter to Kihara police station. PW4 CPL Joel Karanja told the court that he received the report on 3rd August 2014 from PW3 who also informed him that he had spotted the complainant. He proceeded with his colleague where they arrested the accused person.
 13. PW5 Mr. Joseph Maundi, attached to Nairobi Police Surgery produced the P3 form dated 17th July 2014. That he examined the minor and found that she had no physical injuries. Her genitals were in normal condition. However, her labia majora and labia minora were inflamed. He further revealed that the hymen was broken as it was not intact. He further took note of her previous treatment notes. The P3 form was produced as Prosecution exhibit 6.
 14. PW6 Dr. Mugo Charles Njoroge, medical officer working at Kihara Sub District Hospital at the material time to the offence testified that he saw the complainant on 14th April 2015. He was informed about the offence and in addition, that the appellant repeatedly slapped the complainant. She came with complaints of being unable to defecate. She also felt pain when passing urine. He observed that the complainant had facial bruises, abdominal scratch marks, back bruises, a swollen vulva with an intact hymen, an open anal orifice, multiple tears on the anal and rectum, discharge with blood and bruising on the limbs with multiple scratching on the legs.
 15. PW6's confirmed that the vaginal area had no tears. She suffered anal fissures and anal penetration. His findings were that she had been sexually assaulted with anal penetration and a possible attempt of vaginal rape. The report, dated 24th April 2015 was produced and marked Prosecution Exhibit 4. At the close of PW6's evidence on 10th June 2015, the prosecution applied for an adjournment to prefer a second count of attempted defilement. The proceedings recorded the appellant's response: "I have understood."
 16. Thereafter on 22nd July 2015, PW7 PC Paul Kimuge testified that on 13th April 2014, he received PW1's complaint. He then issued a P3 form that was ultimately filled. PW7's evidence was that after that day, the appellant disappeared. They tried looking for him for a period of four months. That he had visited the home of the appellant when he received a call that he was at home. That the appellant came back home and was arrested therein. According to PW7, the appellant was identified by PW3. He was arrested and charged with the present offence.
 17. PW7 produced the complainant's jacket, trouser and birth certificate marked Prosecution exhibit 1, 2, and 3 respectively. When cross examined, PW7 stated that he did not know why the doctor stated that the complainant was four years of age.
 18. At the close of the prosecution case, the trial court established that the prosecution had established a prima facie case as to place the appellant on his defence. The appellant gave a sworn testimony. He urged the trial court to look at the evidence keenly as he denied that he committed the offence. His case was that the complainant had been instructed by her mother to frame him. He informed the court that a grudge existed between his family and that of the complainant. That he was working for PW3 who had for a long time wanted him sacked. Since then, they had not been in good terms. He added that he left home and came back four weeks later and that was when he was arrested and charged with the present offence.



19. In order to establish the offence of defilement, the prosecution must establish the following three crucial ingredients namely the age of the complainant, penetration and the identification of the perpetrator. On the age of the victim, evidence was led before the trial court to establish that the complainant was a child within the meaning ascribed to it as per the *Children's Act*. The birth certificate produced in evidence revealed that the minor was born on 29th May 2008. The offence occurred on 13th April 2014 and as such the complainant was about six years old at the time of the offence.
20. The next ingredient is the aspect of penetration. Section 2 of the *Sexual Offences Act* defines penetration to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. In this aspect, the prosecution relied on the evidence of PW1, PW2, PW4 and PW6 to establish this ingredient. According to the complainant, she was sexually assaulted in the vaginal and anal areas. PW2 on her part observed that the complainant's had bruising on her vagina and anus.
21. On the medical evidence, PW5 testified that he examined the complainant on 17th July 2014. He examined the minor and found that she had no physical injuries. Her genitals were in normal condition. However, her labia majora and labia minora were inflamed. He further revealed that the hymen was broken as it was not intact. PW6 on his part testified that he saw PW1 on 14th April 2015. He was informed about the offence and in addition, that the appellant repeatedly slapped the complainant. She came with complaints of being unable to defecate. She also felt pain when passing urine. He observed that the complainant had facial bruises, abdominal scratch marks, back bruises, a swollen vulva with an intact hymen, an open anal orifice, multiple tears on the anal and rectum, discharge with blood and bruising on the limbs with multiple scratching on the legs. PW6's confirmed that the vaginal area had no tears. She suffered anal fissures and anal penetration. His findings were that she had been sexually assaulted with anal penetration and a possible attempt of vaginal rape.
22. In my view, the medical evidence of PW5 and PW6 were gravely inconsistent in the following terms: while PW5 stated that PW1's hymen was not intact and was broken, PW6 testified that her hymen was intact and not broken. One wonders if the hymen was intact and not broken a year later, in 2015, after the offence, then what informed PW5 to make a finding that the complainant's hymen had been broken three months after the offence? This was a grave inconsistency. Furthermore, PW6 gave gruesome details about the complainant's ordeal which were never mentioned by the complainant nor captured in the P3 form. PW6 testified that the complainant sustained facial bruises, abdominal scratch marks, back bruises, a swollen vulva with an intact hymen, an open anal orifice, multiple tears on the anal and rectum, discharge with blood and bruising on the limbs with multiple scratching on the legs. Why weren't these crucial injuries revealed to the trial court at the testimony of PW1 and only revealed way later after the occurrence of the offence? In my view, the grave inconsistencies cannot be ignored. Withal, while PW2 stated that she saw the presence of semen, no medical officer confirmed those facts as true.
23. The evidence on the ingredient of penetration all alludes to the fact that the aspect of penetration was not proved within the parameters of section 2 of the *Sexual Offences Act*. It is my conclusion that the claim on penetration was an afterthought. It may have been the reason why the prosecution sought an application for adjournment to amend its charge sheet after the close of PW6's evidence. However, the record reveals that the amendment was never followed up in compliance with the law.
24. Lastly, was the appellant properly identified as the perpetrator for the offence? Section 124 of the *Evidence Act* provides that an accused person shall not be convicted of an offence on the basis of a single identifying witness save sexual offences. However, the court must be satisfied that the witness is telling the truth. PW1 was emphatic in her evidence that she was sexually assaulted by the appellant. Throughout the testimonies of the prosecution's witnesses, the appellant pitted out as to suggest that he had been framed as a result of a grudge between himself and the complainant's family.



25. It is testified that the complainant was sexually assaulted on 13th April 2014. However, no medical reports were presented to this court either from Kiambu District Hospital or from Kihara Sub District Hospital as to establish with certainty that the complainant had been sexually assaulted. It is only three months later on 17th July 2014 that the P3 form is filled. Although PW7 testified that he received the report on 13th April 2014 about the offence, why was the P3 form not filled then at the earliest time possible to properly demonstrate that indeed an offence had occurred?
26. Although the prosecution witnesses stated that the appellant went into hiding, no evidence was adduced as to demonstrate the steps they took to for instance secure the crime scene, collect the evidence therein and conduct proper investigations. The appellant all along alluded to the fact that the prosecution witnesses were out to frame him. This was what was furthermore stated in his defence.
27. I am inclined to agree with the appellant. In those three months that have lapsed, doubt was cast. Nothing has been explained to seal that lapse as to eliminate all forms of doubt. I am persuaded to state that the identification of the perpetrator was not proved to the required standard. To convict the appellant based on the evidence that was before the court was too unsafe. It is possible that the appellant had been framed to square out a grudge that existed between the complainant's family and the appellant. That conviction by the trial magistrate was with due respect unsafe.
28. In view of the foregoing, the upshot of my findings is that the appellant's appeal succeeds. I thereby proceed to quash the conviction and set aside the sentence that was imposed upon him. The appellant shall be set free and liberty.

It is so ordered

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JUNE, 2024.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of:-

No appearance for the Appellant

No appearance for the Respondent

Court Assistant- Peter Ong'idi

