Kogo v Republic (Criminal Appeal 335 of 2018)
[2023] KECA 490 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 490 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 335 OF 2018

F SICHALE, FA OCHIENG & LA ACHODE, JJA

MAY 12, 2023

BETWEEN

STANLEY KIPROP KOGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Eldoret (Kimaru, J), dated 4th October 2018 in HC. CRA NO. 204 of 2014)

JUDGMENT

1. Stanley Kiprop Kogo (the appellant herein), has preferred this second appeal against the judgment of Kimaru, J. dated 4th October 2018, in which he had initially been charged at the Chief's Magistrate's Court at Eldoret with the offence of defilement contrary to Section 8 (1) as read with Sub Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on September 29, 2013, at (particulars withheld), he intentionally and unlawfully caused his penis to penetrate the vagina of PC a child aged 10 years.

3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to the provisions of Section 11 (1) of the same Act. The particulars of the offence were that at the same time and place, he intentionally and unlawfully caused his penis to come into contact with the vagina of PC, a child aged 10 years.

4. The appellant denied the charge after which a trial ensued. In a judgment delivered on November 28, 2014, Hon. S.N. Telewa (the then Resident Magistrate, Eldoret) convicted him of the main charge and sentenced him to life imprisonment.

5. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and *vide* a judgment delivered on October 4, 2018, Kimaru J, found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

6. Unrelenting, the appellant has now filed this appeal and probably the last appeal *vide* an undated Memorandum of Appeal filed in Court on October 9, 2018, raising 8 grounds of appeal.

7. Subsequently thereafter the appellant filed his "homemade"amended grounds of appeal on March 10, 2021, raising the following grounds of appeal:

    1. That the learned High Court judge erred in law in failing to take note on mode of documentary supplies and provision thereof flawed. (*Sic*)

    2. That the learned High Court judge erred on points of law on in (*sic*) and here to conventional principles of identification and witness conduct a breach of Sec 163 of the *Evidence Act*. (*Sic*).

    3. That the learned High Court judge erred in law in that inference of guilt charged against the appellant was not proved beyond any reasonable doubt.

    4. That the mandatory minimum sentence imposed was harsh and excessive yet not informed by facts and circumstances of the case."

8. Briefly, the background to this appeal is as follows: PW1 was EJS, the complainant's mother. It was her evidence that on September 29, 2013, she had sent the complainant (PW2) to the shop and that when she went to the road she found her crying. At the time, PW2 was with a neighbor called Peninah. She then enquired from PW2 what had transpired and PW2 told her that the appellant had defiled her. She further testified that shortly thereafter, the appellant emerged from a maize plantation and she asked him why he had defiled her child but he denied. It was her further evidence that PW2 was 10 years old, having been born on January 11th, 2003.

9. PW2 was P.C and the complainant in this case. It was her evidence that on September 29, 2013, her mother (PW1) had sent her to the shop and on the way she met the appellant whom she knew as a neighbor. The appellant held her mouth and told her not to scream while threatening to kill her and led her to a maize plantation, removed her pant, laid her down and defiled her. Shortly afterwards, she ran to a neighbours home (Peninah) and the appellant then emerged from the maize plantation and was arrested by members of the public. She was later taken to Moi Teaching and Referral Hospital for treatment.

10. PW3 was Dr. Imbenzi Joseph attached to Moi Teaching and Referral Hospital. He produced P3 Form on behalf of Dr. Yatich in respect of PW2 who had a history of defilement. On examination, PW2 had no physical injuries but the vagina and labia minora were extra red in an abnormal manner which was as a result of repeated friction. The hymen was torn with fresh tears and penetration had been established.

11. PW4 whose name was apparently not indicated was the investigations officer in this case. It was his/her evidence that September 29, 2013, he/she was at Soy police station when he/she was informed by the OCS that there was a suspect who had been arrested by members of the public at a place called Chechnia". He/she proceeded to the scene and found the appellant having been arrested by members of the public and upon enquiry, PW2 told him/her that the appellant had dragged her into a maize plantation, removed her pant and defiled her. He/she later arrested the appellant and charged him with the offence as indicated on the charge sheet.

12. The appellant in his defence gave a sworn statement and called two witnesses and denied having committed the offence

13. DW2 and DW3 Christopher Chirchir Kirui and Fabian Wanaswa respectively, testified that the appellant had never been charged previously and that they knew the charges that he was facing.

14. When the matter came up for plenary hearing on February 13, 2023, the appellant who appeared in person briefly orally highlighted his written submissions and submitted that the clinical card relied on by the prosecution to prove the complainant's age was a forgery and further that, although he was taken to hospital and examined, the doctor had stated that there was nothing to connect him with this offence.

15. Ms. Okok learned counsel for the State on the other hand while opposing the appeal relied on her written submissions dated February 10, 2023 and submitted that the appellant's appeal raised three issues namely; identification, the age of the complainant and the constitutionality of the minimum sentence meted out on the appellant by the trial court.

16. With regard to identification, it was submitted that this was a case of recognition as opposed to identification and that the appellant was properly identified as the perpetrator by the complainant as he was a neighbor and even though the incident happened at around 7:00PM, there was some light as it was not very dark.

17. Turning to age of the complainant, it was submitted that the issue of the immunization card being a forgery was a matter of fact and that the appellant did not object to production of the same during the trial and that as such this allegation was an afterthought.

18. Finally, on sentence, it was submitted that the appellant was sentenced to life imprisonment which was the minimum sentence provided for under Section 8 (2) of the *Sexual Offences Act* that the appellant was charged with.

19. We have considered the record, the rival oral and written submissions, the authorities cited and the law.

20. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In *Kados vs. Republic Nyeri* Cr. Appeal No. 149 of 2006 (UR), this Court rendered itself thus on this issue:

> " ...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

21. In *David Njoroge Macharia vs. Republic* [2011] eKLR it was stated that under Section 361 of the *Criminal Procedure Code*:

> "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)."

22. Having considered the grounds of appeal raised by the appellant, we are of the considered opinion that the following 3 main issues arise for our determination:

    1. Whether the appellant was properly identified?

    2. Whether the charge of defilement was proved to the required standard beyond any reasonable doubt?

3. Whether the mandatory minimum life imprisonment imposed on the appellant was harsh and excessive in the circumstances?

23. Turning to the first issue, PW2 who was the complainant in this case testified that on September 29, 2013 she had been sent to the shop by her mother (PW1), when she met the appellant on the way whom she knew as a neighbor who accosted her, covered her mouth dragged her into a maize plantation and defiled her. Her evidence towards this respect remained largely uncontroverted throughout the trial.

24. In cross examination, she remained firm and consistent when she stated thus;

> " I know you. You are a resident of (particulars withheld). I know your first name. I went to the shop at 7:00pm. There was still light.....you took me to the maize..... you closed my mouth...."

25. PW1 corroborated PW2's evidence that she knew the appellant as a son of her neighbor and a student and her evidence towards this respect remained unchallenged throughout the trial. From the overwhelming evidence on record, it is apparent that the appellant was well known to both PW1 and PW2 as a neighbor. This was therefore a case of positive recognition as opposed to identification.

See *Kenga Chea Thoya v Republic* Criminal Appeal No 375 Of 2006(Unreported) where this Court stated thus;

> " On our own re-evaluation of the evidence, we find this to be a straight forward case in which the appellant was recognized by the witness (PW 1) who knew him. This was clearly a case of recognition rather than identification and as it has been observed severally by this Court, recognition is more satisfactory more assuring and more reliable than identification of a stranger – see Anjononi V. Republic [1980] KLR 59."

26. Even though the incident happened slightly after 7PM, PW2 stated both in her evidence in chief and cross examination that there was still some light and she was able to see the appellant. We are therefore satisfied that the identification of the appellant as the perpetrator of this offence was free from the possibility of any error and there was no case of mistaken identity and the appellant was positively identified. More tellingly so, the appellant was arrested almost immediately after the incident. Consequently, nothing turns on this ground of appeal and the same must fail.

27. Turning to the other ground of appeal and as to whether the charge of defilement was proved to the required standard beyond any reasonable doubt, it is now well settled that for a conviction to be found on a charge of defilement three key ingredients must be proved namely; age of the victim, prove of penetration and identification of the appellant as the perpetrator of the offence.

28. PW2 who was the complainant in this case during voir direexamination stated that she was 11 years old. In her examination in chief she testified that she was in standard 2 and she was aged 11 years having been born in the year 2003. PW1 on the other hand who was the complainant's mother testified that she was aged 10 years old and that she was born on January 11, 2003.

29. The evidence of these two witnesses remained uncontroverted throughout the trial. Additionally, the immunization card produced by PW4 who was the investigations officer in this case showed that PW2 was born on January 11, 2003. This therefore means that at the time of the commission of the offence in the year 2013, the complainant was aged 10 years.

30. The contention by the appellant that the immunization card produced by the prosecution to prove the complainant's age was a forgery was not supported by any evidence and the appellant cannot be

heard to raise this issue at this stage as he did not raise it during the trial a neither did he object to the production of the same. The same is therefore clearly an afterthought. In any event, nobody could know better the age of her child than a mother. Consequently, we are satisfied that the complainant's age was proved to the required standard.

31. Turning to the issue of penetration, PW2 who was the complainant in this case testified that on September 29, 2013, she was going to the shop when she was accosted by the appellant who dragged her to a maize plantation and proceeded to defile her. PW1 who was PW2's mother corroborated PW2's allegations that she had been defiled when she testified *inter alia* that on examining PW2, she was bleeding from her private parts. The evidence of these two witnesses was supported by the findings contained in the P3 form produced by PW3 who stated that there were fresh tears on PW2's private parts and that her hymen had been broken and that penetration had been established.

32. From the evidence that was tendered in the trial court, we are satisfied that penetration was proved to the required standard. The contention by the appellant that he was examined and that there was nothing to connect him with this offence is really neither here nor there as his medical condition does not bolster the evidence of the prosecution. In any event, medical evidence is not the only way to prove a charge of defilement/rape. See the case of *Kassim Ali v Republic* (2021) eKLR where this Court stated;

> " So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence"

33. On identification, we have already addressed this issue and we need not belabor the point. The contention by the appellant that PW2 was coached was not supported by any evidence. If PW2 had been coached as alleged, she would for example testify "I was told to say...".

34. In view of the above, and having reevaluated the evidence on record, we are satisfied that all the ingredients of the offence of defilement were proved to the required standard and this ground of appeal must fail in its entirety.

35. Accordingly, we are in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of defilement against the appellant beyond any reasonable doubt and that there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement and that it was the appellant who defiled PW2 and no one else.

36. We therefore find and hold that the appellant's conviction for the offence of defilement was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant's appeal on conviction.

37. Lastly, the appellant contended that the sentence mandatory minimum of life imprisonment meted on him was harsh and excessive in the circumstances.

38. The appellant was charged with the offence of defilement contrary to Section 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006. Under the aforesaid Section, a person convicted of the offence of defilement shall be sentenced to life imprisonment. Be that as it may, the jurisprudence that has been emerging from this Court is that minimum sentence fetters the discretion of a judge to impose an alternative sentence in an appropriate case and is to an extent an affront on the doctrine of separation of powers.

39. We have considered the circumstances under which the offence was committed and the same do not appear to be aggravated. The record appears incomplete and the page on sentencing is missing. We are therefore not able to discern what the appellant stated in mitigation. Be that as it may, the appellant in his submissions stated that he had just attained 18 years. Indeed, PW1 in her evidence stated that she knew the appellant as a student. The appellant was therefore a fairly young man.

40. In view of the above, we are inclined to exercise our discretion in favour of the appellant in reducing the sentence. Accordingly, we hereby substitute the sentence of life imprisonment meted on the appellant with a sentence of 30 years' imprisonment to run from the date of sentencing in the lower court.

41. The appellant's appeal only succeeds to that extent. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 12TH DAY OF MAY, 2023.

F. SICHALE

JUDGE OF APPEAL

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F. OCHIENG

JUDGE OF APPEAL

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L. ACHODE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR