GK v Republic (Criminal Appeal E016 of 2021)
[2022] KEHC 3246 (KLR) (12 May 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPENGURIA

CRIMINAL APPEAL E016 OF 2021

WK KORIR, J

MAY 12, 2022

BETWEEN

GK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. S.K. Mutai, PM, delivered on 7/10/2021 in Kapenguria SPM'S S.O. Criminal Case No. 4 of 2020, R. v G.K)

JUDGMENT

1. The Appellant, GK, was in the main count charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2006. The particulars of the charge stated that on 17th December, 2019 within West Pokot County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of RC, a child aged 11 years.

2. The Appellant was faced with an alternative charge of committing an indecent act with a child contrary to Section 11(A) of the *Sexual Offences Act*, 2006. Owing to the fact that the Appellant was convicted and sentenced to serve 20 years in prison on the main charge, I need not state the particulars of the alternative charge.

3. Being dissatisfied with both the conviction and sentence the Appellant appeals to this Court on the grounds:

    i. That the learned trial Magistrate erred in law and fact in convicting the appellant and sentencing him to 20 years in jail yet the appellant herein is a minor;

    ii. That the learned trial Magistrate erred in law and fact when he convicted the appellant on a charge that had not proved as required;

iii. That the learned trial Magistrate erred in law and fact when he disregarded the evidence of the appellant and termed it as mere denial;

iv. That the learned trial Magistrate erred in law and fact when he failed to appreciate that the evidence of PW1 was not corroborated and went ahead to believe the evidence of the prosecution;

v. That the learned trial Magistrate failed to appreciate that there were many gaps in the prosecution case and which gaps should have raised a doubt in his mind;

vi. That the learned trial Magistrate erred in law [when he] cut short the appellant's education and life on a charge that was poorly investigated;

vii. That the findings of the learned trial Magistrate were against the weight of the available evidence;

4. At the trial, the prosecution called four witnesses in support of its case. The complainant, RC, aged 11 years gave sworn testimony as PW1. She testified that on 17th December, 2019 at around 11.00 a.m. she was sent by her sister one VC to go and get firewood from the bush. She was accompanied by her younger brother called J. Once in the bush, she sent her brother to go back home to bring a rope. It was PW1's testimony that it was at that juncture that the Appellant came and got hold of her hand and pressed her down. The Appellant then removed her pair of knickers and did "tabia mbaya" to her.

5. PW1 further testified that the Appellant inserted his penis in her vagina and she felt a lot of pain. She screamed and the Appellant stood up, put on his clothes and ran away. PW1 then went home crying and informed her sister VC about what the Appellant had done to her. Her sister in turn passed the report to their mother. She was taken to Kapenguria County Referral Hospital the next day where she was treated and the matter reported to the police. The complainant told the Court that she was issued with a P3 form. She identified the Appellant in Court.

6. On cross-examination, PW1 testified that she went to the hospital the following day after taking a bath. Her evidence was that she never talked of any fluid and that she did not produce her undergarment in Court. PW1 denied knowledge of a land dispute between her family and the family of the Appellant.

7. PW2 VC told the Court that PW1 was her sister and the Appellant was their neighbor. Her evidence was that on 17th December, 2019 at around 11.00 a.m., she sent PW1 and their younger brother called J. to go and fetch firewood. The duo went away and returned after about 3 hours. PW1 was crying. Upon interrogation, PW1 informed her that the Appellant had done "tabia mbaya" to her. PW2 checked the vagina of PW1 and saw blood. She called their parents who were out of network. She then called her other sister called M and sent the children to her place. She identified the Appellant in Court.

8. On cross-examination, PW2 testified that they had no land dispute with Appellant's family. She told the Court that the undergarment which PW1 was wearing on the material day was not in Court. She also stated that she did not know when PW1 was taken to the hospital.

9. Andrew Mapele Matanda, a clinical officer at Kapenguria County Referral Hospital testified as PW3. He produced a P3 form filled for PW1 on 30th December, 2019. He told the Court that the patient was seen on 20th December, 2019 by his colleague who had since passed away. His evidence was that he was familiar with the handwriting and signature of his fellow medical officer. PW3 testified that on examination, the patient had a whitish discharge on the vaginal area and the hymen was broken. Although the vaginal area was reddish, there were no physical injuries and the outer genitalia were normal. PW3 told the trial Court that PW1 had washed herself and changed her clothes.

10. PW3 also testified that there was presence of red blood cells, blood and pus cells in the urine. Based on the PRC filled by his deceased colleague in which he had determined that the patient had been defiled, he filled a P3 form which he produced as exhibit alongside the PRC form and the complainant's age assessment report.

11. Responding to questions put to him in cross-examination, PW3 testified that the hymen was broken but there were no injuries on the genitalia. He stated that hymen can be broken by a tampon or any object. PW3 also testified that they did not establish the cause of the complainant's infection. He told the Court that he filled the P3 form based on the notes prepared by his deceased colleague whose name he had not given to the Court.

12. On re-examination, PW3 stated that the PRC form was filled by his colleague who appended his signature. Further, that pus cells are caused by bacterial infection.

13. PW4 Police Constable Gilbert Rono of Kapenguria Police Station investigated the case. His evidence was that after interviewing the victim and the other witnesses, he escorted the victim to Kapenguria County Referral Hospital for examination and treatment. He also visited the scene of crime but he made no recovery.

14. PW4 further testified that a P3 form was filled and the Appellant was later arrested on 11th January, 2020. The witness told the Court that an assessment of the age of the victim disclosed that she was 11 years old.

15. When cross-examined by the Appellant, PW4 testified that he was not the initial investigating officer and that he did not record his statement. He stated that his evidence was a restatement of the investigations carried out by Police Constable Tunje.

16. On re-examination, PW4 stated that he investigated the matter with Constable Tunje.

17. In his defence the Appellant testified as DW1 and called DW2 Samuel Rono as his witness. The Appellant testified that he was 17 years and in class 7. He denied defiling the complainant and told the trial Court that on 17th December, 2019 he went to Murkwijit to assist his aunt by the name M1. He stayed there until 11th January, 2020 when he returned home and he was arrested. The Appellant denied having any relationship with the complainant.

18. On his part DW2 stated that on 16th December, 2019, the Appellant went to his aunt's place at Murkwijit and was therefore not at Nangrotum on 17th December, 2019. The witness further told the trial Court that the Appellant came back from Murkwijit on 1st January, 2020.

19. The Appellant filed submissions dated 19th February, 2022. On the issue of his age at the time of the commission of the offence, he submitted that although he did not provide any document to show that he was a child, the trial Court ought to have ordered for his age to be assessed before sentencing him. The Appellant submitted that pursuant to the order issued by this Court on 31st January, 2022 for the assessment of his age, it was found that he is currently 18 years and he was therefore a minor at the time he was charged. The Appellant relied on Section 190 of the *Children Act* for the submission that his imprisonment for 20 years was unconstitutional. He also relied on the cases *G.O. v Republic*, Siaya HCCRA No. 155 of 2016 and *Amos Kipchirchir Cheruiyot v Republic*, Eldoret HCCRA No. 133 of 2019 where the prison sentences of the minor appellants were set aside and they were placed on probation.

20. On his claim that the evidence adduced at the trial could not sustain a conviction, the Appellant argued that that the offence of defilement was not proved against him for various reasons. First, that there

was no explanation as to why it took over one month to arrest him; second, that despite the offence having allegedly been committed on 17th December, 2019, the complainant was only taken to the hospital on 27th December, 2019 and the delay has not been explained; third, that there was no proof of penetration; fourth, that PW1 was an unreliable witness as she gave contradictory evidence on the date she was allegedly taken to hospital; fifth, that there was no corroboration of the evidence of PW1 hence the same cannot be relied upon; and lastly, that the medical officer did not tell the Court whether the hymen was freshly broken.

21. In urging this Court to find that the prosecution did not prove its case as required, the Appellant placed reliance on the case of *DWM v Republic*, Nakuru HCCRA No. 40 of 2015 where it was held that there was need to link the infection of the complainant with a sexual disease to the appellant.

22. The Respondent filed submissions dated 23rd March, 2022 contending that the case against the Appellant was proved to the required standards. The Respondent's position is that the evidence of PW1 was corroborated by that of PW2 and PW3 as well as the PRC and P3 forms.

23. On the claim that the Appellant was a child at the time of the commission of the offence, the Respondent contended that the issue of age was only raised during sentencing and there was no evidence placed before the trial Court to corroborate the assertion that the Appellant was a minor. According to the Respondent, the trial Court cannot therefore be faulted for overlooking the Appellant's age. The Respondent submitted that even though an age assessment report was filed during the appeal, this Court should treat the report as an afterthought. In conclusion, the Respondent urged this Court to find that the prosecution proved its case and the trial Court imposed the appropriate sentence.

24. A perusal of the petition of appeal, the trial record and the submissions of the parties shows that two issues arise for the determination of this Court. The first issue is whether the charge against the Appellant was proved to the required standard. The second issue is the legality and appropriateness of the sentence imposed on the Appellant.

25. This being a first appeal, the duty placed upon this Court is to consider the evidence adduced at the trial afresh in order to reach its own independent decision. In doing so, the Court must warn itself of the fact that unlike the trial Court it did not have an opportunity of hearing and seeing the witnesses testify in order to gauge their demeanour. In assessing the evidence, the Court should therefore give allowance to the fact that it did not try the case.

26. I start by dealing with the issue as to whether the charge against the Appellant was proved beyond reasonable doubt as was required of the prosecution by the law. The Appellant has challenged his conviction on the grounds that there was no explanation as to why it took over one month to arrest him; that despite the offence being alleged to have taken place on 19th December, 2019, the complainant was taken to the hospital seven days later on 27th December, 2019; that there was no proof of penetration; that the complainant was an unreliable witness given that she gave contradictory evidence regarding the date she was taken to the hospital; that there was no corroboration of the evidence of the complainant; and, that even if the complainant's hymen was broken, the medical officer did not explain whether the tear was fresh or old.

27. The complaints of the Appellant find no support from the trial proceedings. During cross-examination, PW1 testified that she was taken to the hospital on the day following the incident. This means that she was taken to the hospital on 18th December, 2019. It is clear from the record that the complainant did not mention any other date and the Appellant's assertion that she is not a reliable witness because she gave different dates as to when she was taken to hospital is therefore untenable. The

PRC, however, shows that the form was filled on 20th December, 2019 and that was the date the patient was seen. This is in line with the evidence of PW3 who told the Court that his deceased colleague saw the patient on 20th December, 2019. The documentary evidence on the date the complainant was taken to hospital also tallies with that of PW4 who told the Court that the defilement was reported to the police on 20th December, 2019 and the victim taken to the hospital on the same date.

28. There is, however, contradiction between the evidence of the complainant and that of PW3 and PW4 regarding the date the complainant was taken for treatment. In such circumstances, the question is whether the contradiction goes deep into the root of the charge that was preferred against the Appellant. On this issue, the Court of Appeal in *Jackson Mwanzia Musembi v Republic* [2017] eKLR cited with approval the Ugandan case of *Twehangane Alfred v Uganda*, Criminal Appeal No 139 of 2001; [2003] UGCA 6 where it was held that:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

29. Still on the same issue, the Court of Appeal in the just quoted case cited its own holding in *Philip Nzaka Watu v R* [2016] eKLR that:

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

30. The contradiction on the date of the treatment of the complainant is minor and does not affect the consistency of the evidence of the witnesses as regards who saw what and who did what in respect of the incident. Indeed, the contradiction between the evidence of the complainant and the other witnesses does not in any way support the Appellant's submission that the complainant was taken to hospital 7 days after the incident. The contradiction cannot lead this Court to the conclusion that the complainant's evidence was so inconsistent that she can be termed a liar. The evidence on record confirms that she was actually seen by a medical practitioner in a government facility on allegation of having been sexually assaulted.

31. Another ground upon which the Appellant challenges his conviction is that penetration was not proved. It was the evidence of PW1 that the Appellant inserted his penis in her vagina and she cried because she felt a lot of pain. PW3 on his part testified that there was presence of red blood cells, blood and pus cells in the urine. PW3 further told the Court that the medical officer who examined the patient formed the opinion that she had been defiled. PW3 also testified that the complainant's hymen was broken. On top of the evidence of the complainant and PW3 is that of PW2 who told the Court that when the complainant reported the incident to her, she inspected her private parts and saw blood. I therefore find that there was adequate evidence to support the trial Magistrate's finding that the complainant had been penetrated.

32. The Appellant claims that the evidence on record does not directly link him to the penetration of the complainant. In this regard, he argues that the evidence of the complainant was not corroborated. The Appellant is indeed correct that there was no independent eye witness to the incident. The Appellant, however, fails to appreciate the fact that corroboration is not only provided by eyewitnesses. Evidence can be corroborated in many other ways. In the case at hand, PW2 corroborated the evidence of the complainant when upon receiving her report she checked her and saw blood in her vagina. The medical evidence adduced by PW3 also confirmed that the complainant was sexually violated.

33. It is also important to bear in mind that in sexual offences, Section 124 of the *Evidence Act* permit the courts to solely rely on evidence of a victim by providing as follows:

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations 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.

34. The cited proviso to Section 124 of the *Evidence Act* has been discussed in several decisions. In *TOO v Republic* (Criminal Appeal 144 of 2016) [2022] KECA 472 (KLR), the Court of Appeal explained the rationale behind the said proviso thus:

> " The rationale for this is easy to see. Rarely will sexual offences be committed in the open and in the full glare of a third party or parties. They would be done in hiding and may sometimes be insidious. It would therefore be an injustice to the victim to require that another set of eyes will always be available to corroborate her or his story."

35. Looking at the evidence adduced by the complainant, the impression I form is that of a truthful person. Her testimony was supported by that of PW2 and PW3. The evidence adduced pointed to the Appellant as the person who had unlawful carnal knowledge of the complainant.

36. There was the argument by the Appellant that he was not guilty because the prosecution failed to explain why he was not arrested immediately after he committed the alleged crime. It is ironical for the Appellant, who admitted that he left the village on the date of crime and came back on the date of his arrest, to again question why it took long to arrest him. It is obvious that he could not be immediately arrested because he went underground after committing the offence.

37. In this case, all the ingredients of the offence of defilement namely penetration, the age of the victim and the identity of the perpetrator were all proved. For the record, the fact that the complainant was a child was established by the age assessment report dated 13th January, 2020 which was produced as an exhibit by PW3.

38. What remains to be considered on the issue of the conviction of the Appellant is his claim that the trial Magistrate did not consider his defence. The Appellant's defence is that he was not at the scene of crime on the date of the offence. He also raised what appears to be an alibi defence by calling DW2 who told the Court that the Appellant left their village for another village on 16th December, 2019 which was a day before the offence was committed.

39. In the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR, the Court of Appeal discussed alibi defence as follows:

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."

40. From the record, it is clear that the Appellant never raised the issue of his being away from the scene of crime when cross-examining the prosecution witnesses. The prosecution was therefore not given an opportunity to rebut the alibi defence. In fact, the Appellant concentrated his cross-examination of PW1 and PW2 on the alleged existence of a land dispute between their family and his family. During his defence, however, he abandoned the issue of a land dispute and instead testified as to his absence from the village at the time of commission of the offence. From the manner the Appellant conducted his defence, one can only conclude that he was not truthful. It is therefore reasonable to agree with the trial Court that the Appellant's claim of having been at Murkwijit at the time of the commission of the offence was untenable and an afterthought. From the evidence on record, it is logical to conclude that the Appellant disappeared to Murkwijit after committing the offence. The Appellant's defence was therefore properly rejected.

41. The fact of penetration, the age of the complainant and the identity of the defiler having been proved beyond reasonable doubt by the prosecution, the trial Magistrate had no alternative but to convict the Appellant. On my part, I find the conviction of the Appellant safe and reject his appeal against conviction.

42. The remaining issue is the legality and appropriateness of the sentence imposed by the trial Court upon the Appellant. It is the Appellant's case that the trial Magistrate ought to have considered that he was a minor at the time he was charged before sentencing him to imprisonment. The Appellant was charged, tried, convicted and sentenced to 20 years in prison for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2006.

43. The Respondent's position on the Appellant's claim that he was a child at the time of the commission of the offence is that the question of his age was only raised during the sentencing and there was no evidence placed before the trial Court to corroborate the assertion that he was a minor. It was therefore the Respondent's contention that the claim by the Appellant that he was a child at the time he was charged was an afterthought and the sentence passed by the trial Court should be upheld.

44. As submitted by counsel for the Appellant, Section 190(1) of the *Children Act*, 2001 bars imprisonment or detention of a child. Of course child offenders who become adults during trial can be imprisoned if found guilty of committing heinous crimes-see *Daniel Langat Kiprotich v State* [2018] eKLR and *R v Dennis Kirui Cheruiyot* [2014] eKLR.

45. In this case, the record discloses that counsel for the Respondent is incorrect when he claims that the issue of the Appellant's age only arose during mitigation. The record shows that on 21st September, 2021 when the Appellant testified in his defence, he told the Court that he was seventeen years old. The fact of the Appellant's age having been brought to the attention of the trial Court, the Magistrate after convicting him was required to call for evidence on his age in order to be guided on the appropriate

sentence to pass. Indeed, Section 191 of the *Children Act* provides many reformist and friendlier methods of dealing with child offenders.

46. The age assessment report filed by the Appellant's counsel indicates that the Appellant was eighteen years on 1st February, 2022. It is therefore possible that he was seventeen years and therefore a child when he was sentenced on 7th October, 2021. The imprisonment of the Appellant therefore contravened Section 190(1) of the *Children Act*, 2001. The Appellant's appeal on sentence is therefore merited and allowed in the terms to be set in this judgement.

47. What then should have been the appropriate sentence for the Appellant in this case? Although the Appellant was found guilty of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2006 meaning that he defiled a girl aged eleven years or less, the truth of the matter is that as per the age assessment report dated 13th January, 2020 which was produced as an exhibit at the trial, the complainant's age was above eleven years and below sixteen years.

48. Assuming the complainant was almost sixteen years of age, then she was not so young and was almost the age mate of the Appellant. The Appellant has been in prison for over seven months. Though the sentence was illegal ab initio, the period spent in custody must have taught the Appellant the lesson that any girl under the age of eighteen years is a no-go area and that you can only have sexual engagements with a woman of any age with her unequivocal consent.

49. In short, the Appellant's appeal on conviction is rejected but his appeal on sentence is allowed. The sentence of imprisonment for twenty years is set aside. The appeal on sentence having succeeded, the Appellant is forthwith set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAPENGURIA THIS 12TH DAY OF MAY, 2022.

W. KORIR,

JUDGE OF THE HIGH COURT