Case Number:	Criminal Appeal 131 of 2018
Date Delivered:	24 Jul 2019
Case Class:	Criminal
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Ruth Nekoye Sitati
Citation:	Gideon Majau Gitire Alias Kombo v Republic [2019] eKLR
Advocates:	Kirimi for Appellant Namiti for Respondent
Case Summary:	-
Court Division:	Criminal
History Magistrates:	E. Ayuka, Resident Magistrate
County:	Meru
Docket Number:	-
History Docket Number:	Cr (S.O) case no. 38 of 2016
Case Outcome:	-
History County:	Meru
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 131 OF 2018

GIDEON MAJAU GITIRE ALIAS KOMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence dated 13th July 2018 by Hon. E. Ayuka, Resident Magistrate in Nkubu PMC Cr (S.O) case no. 38 of 2016)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein GIDEON MAJAU GITIRE was arraigned before the Principal Magistrates Court at Nkubu on two counts of ***defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006.*** In count 1, it is alleged that on the 15th day of November 2016 in Imenti South Sub-County within Meru County, he intentionally caused his penis to penetrate the vagina of WG, a child aged 7 years.

2. In the alternative to count 1, the appellant is charged with the offence of ***committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006,*** the particulars being that on the 15th day of November 2016 in Imenti Sub-county within Meru County, he intentionally touched the buttocks/vagina of W.G, a child aged 7 years with his penis.

3. The particulars in count II are that on the 15th day of November 2016 in Imenti south Sub-county within Meru County, he intentionally caused his penis to penetrate the vagina of KJK, a child aged 8 years. In the alternative to Count II, it was alleged that the appellant ***committed an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006,*** the particulars being that on the 15th day of November 2016 in Imenti Sub-county within Meru County, he intentionally touched the buttocks/vagina of K.J.K, a child aged 8 years with his penis.

4. The appellant denied both counts. The prosecution called 7 witnesses in support of its case and at the close thereof, the appellant was found to have a case to answer and accordingly placed on his defence. He gave sworn testimony in which he raised an alibi defence.

5. At the conclusion of the hearing, the learned trial court was satisfied that the prosecution had proved its case beyond any reasonable doubt on the main counts. It found the appellant guilty as charged, convicted him and sentenced him to life imprisonment on each of the counts. From the record, the trial court ordered ***"the sentence in count II is/shall be in abeyance."***

The Appeal

6. The appellant was dissatisfied with the entire judgment of the learned trial court. He brought this appeal on grounds:-

i. THAT the learned magistrate erred in convicting the appellant without considering that the prosecution had not proved

the age of the children.

ii. THAT the learned magistrate erred in law and fact in convicting the appellant on charges of defilement contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006 on contradicting evidence especially PW1, PW2 and PW6.

iii. THAT the learned trial magistrate erred in law and fact in convicting the appellant in the absence of any medical evidence linking the appellant to the alleged offence.

iv. THAT the learned magistrate erred in law in convicting the appellant on the charge of defilement contrary to section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006 upon evidence of the minor that was not corroborated.

v. THAT the learned trial magistrate erred in law and fact by allowing the prosecution to amend its charges on 18th December, 2017 after the prosecution had called five witnesses and failed to inform the accused of his right to recall the witnesses for further cross-examination based on the new amendments.

vi. THAT the judgment, conviction and sentence of the Appellant was against the weight of the evidence, harsh and excessive and not in tandem with the evidence tendered.

vii. THAT the learned trial magistrate erred in law and fact in dismissing the defence of the accused.

7. In a nutshell, the appellant alleges that the prosecution did not prove its case against him to the required standard of beyond reasonable doubt, and that in the circumstances, the appellant should have been given the benefit of the doubt and acquitted of the offences.

8. This is a first appeal, and that being the case, this court is under a duty to reconsider and evaluate the evidence afresh with a view to coming to its own conclusions in the matter only bearing in mind the fact that in its appellate position, it has no opportunity of seeing or hearing the witnesses, and to make an appropriate allowance for the same. In ***David Njuguna Wairimu versus Republic [2010]eKLR,*** The Court of Appeal held, *inter alia,* that

"***The duty of the first appellate court is to analyse and re-evaluate the evidence that was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

The Prosecution Case

9. On 15th November 2016, at about 3.00pm WG, a girl aged 7 years who testified as PW1 and KJK a girl aged 8 years and who testified as PW2 were playing together at Kageni's place when the appellant, whom they knew as Kambo or Gideon Majau, approached them and asked them to accompany him to the home of M. M is father to PW2. M was not at home at the material time. Once at M's house, the appellant took the girls to the nearby maize plantation and asked them to remove their clothes which they did. The appellant also removed his trouser and inner wear and "did **tabia mbaya**" to the two girls in turn. He started with PW1. He also asked the girls to pinch his penis but the girls refused. He promised to buy the girls "**ngumu**" and to give them money.

10. PW1 testified that as the appellant "did **tabia mbaya"** to her she felt a lot of pain in her vagina. She started crying but the appellant warned the girls not to say anything to anyone about what had happened to them.

11. When PW1 could not bear the pain any longer some days after the incident, she informed Mama G, SN, who testified as PW3. When PW3 interrogated PW2 concerning what PW1 had told her, PW2 repeated the same story to PW3. Upon getting those reports, PW3 informed TK, PW5, who is father to PW2. She also informed PB, PW4, who is father to PW1. Arrangements were made to take both PW1 and PW2 to Kanyakine District hospital where they were examined by PW7, Seberina Kaimatheri, a clinical officer at the facility. The two girls were taken to the hospital 8 days after the incident because they had remained silent after the appellant warned them not to say anything to anyone about what he had done to them.

12. PW7 testified that on examination of PW1, she found that PW1 could express herself well. She had been treated a day before and was aged 6 years 11 months. On examination of the genital area, PW1's private parts were reddish and painful. The hymen was absent. A whitish discharge was noted. The discharge revealed red blood cells. HIV test was negative, but there were numerous pus cells. With the help of the earlier treatment notes and the PRC form, PW7 filled the P3 in respect of PW1. PW7 concluded that there had been penetration of PW1's vagina.

13. With regard to PW2, PW7 testified that PW2 gave her a history of how she had been defiled by someone both her and PW1 knew. PW2 was 9 years 6 moths old. PW2's private parts were painful and reddish. Though there was no discharge, PW2's hymen was missing. PW7 concluded that the pain and redness of the vagina was proof that PW2 had been defiled and penetration had occurred. The P3 form and PRC form for PW1 were produced as Pexhibit 2 and 4 respectively. The P3 form and PRC form for PW2 were produced as Pexhibits 5 and 6 respectively.

14. PW4 the father of PW1 producedPW1's health card which showed that PW1 was born on 3rd January 2010 and was in class 1 at her school. PW4 also testified that when he interrogated both PW1 and PW2, they gave him a consistent story of how the appellant lured them into the shamba and defiled them in turns.

15. PW5, the father of PW2, also testified and produced PW2's health card as proof of age of PW2. According to the document, PW2 was born on 24th November 2009, and that she was in class 2. PW5 confirmed that the appellant was a neighbour and that his alias or village name was Kambo. Both PW4 and PW5 testified that they took their daughters to hospital at the earliest opportunity after PW1 and PW2 revealed to them what the appellant had done to them.

16. PW6 was No. 85799 CPL Catherine Njoka who was the Investigating Officer in this case. She was on duty at Kinoro Police Station on 24th November 2016 when reports of the two defilement incidents were made to her. She saw both PW1 and PW2 and interrogated them. Both PW1 and PW2 gave the appellant's name as Kambo. After taking statements, she issued P3's to the two children. As part of her investigations, PW6 obtained the child health cards for each of the children and according tot those cards, PW1 was born on 3rd January, 2010 while PW2 was born on 24th November, 2009. The clinical cards for PW1 and PW2 were produced in evidence as Pexhibits 1 and 3 respectively.

17. After being given particulars of the appellant by PW1, PW2, PW4 and PW5. PW6 telephoned the appellant's employer with a request to take the appellant to the police station. Once at the police station, the appellant was arrested and subsequently charged with the two offences.

18. It is to be noted that all the witnesses were able to identify the appellant during the trial.

The Defence Case

19. The appellant gave a brief sworn testimony in which he raised the defence of alibi. He alleged that the case against him was a frame-up because of a land dispute between the girls' grandfather and his father. He also alleged that on the material day, he was at Chogoria repairing motor cycles.

20. Though the appellant initially indicated he was to call a witness, he did not do so.

Issues and Submissions

21. In a case of this nature, the prosecution was under a duty to prove the age of the complainants, the fact of penetration and that it was the appellant who caused the penetration to both PW1 and PW2.

22. S***ection 8(1) of the Sexual Offences Act*** defines defilement as an act by a person which causes penetration with a child. If the child in question is aged eleven years or less, a person who commits the offence of defilement shall be sentenced to life imprisonment upon conviction.

23. Penetration is defined under ***section 2 of the Act*** to mean "***The partial or complete insertion of the genital organs of a person into the genital organs of another person."*** The courts have lauded this definition because in most defilement cases the culprits are

in a hurry to get over with their deed and vanish from the scene, and as such may never cause deep penetration.

24. In his oral submissions Mr. Karimi reiterated the 7 grounds of appeal and submitted, regarding the age of the complainants that the child health cards could not take the place of birth certificates as proof of age. Counsel also pointed out that there were material contradictions between the evidence of PW1 and PW2 as well as PW6 as to the actual place where the alleged offence took place. Counsel also rubbished the medical evidence which he said was as a result of tests done 8 days after the incident and that such evidence ought not to have been used to convict the appellant. That a DNA should have been done.

25. Counsel also contested the *voir dire* examination conducted on PW1 and PW2 and urged this court to make a finding that the same did not meet the required threshold. Counsel also submitted that failure by the trial court to inform the appellant of his rights under ***section 214 of the Criminal Procedure Code*** was a fundamental breach of the appellant's right to fair trial as provided under ***Article 50(2) of the Constitution of Kenya 2010. Section 214 of the CPC*** deals with issues arising out of variance between charge and evidence and amendment of charge, when changes in the same is necessary to meet the circumstances of the case. Counsel also submitted that the trial court's refusal to grant further adjournments tot he appellant to call his witness who was allegedly admitted in hospital was prejudicial to the appellant.

26. The appeal was opposed by Mr. P. M. Namiti, prosecution counsel. He submitted that the evidence adduced against the appellant was watertight and foolproof and the appeal should therefore be dismissed. Counsel also submitted that there were no contradictions in the prosecution evidence as alleged by the appellant. Finally, counsel submitted that appellant's contention that the case against him was fueled by a land dispute between his father and the complainant's grandfather was a mere afterthought which deserved to be disregarded altogether.

Analysis and Determination

27. I have now carefully reconsidered and evaluated the evidence afresh while making allowance for the fact that I did not see and hear the witnesses. I have also considered with keenness the judgment of the learned trial court, the grounds in the petition of appeal as well as the law and the submissions and from all the above, I am satisfied that the prosecution proved its case against the appellant on the two main counts beyond any reasonable doubt. This means that I am in agreement with the learned trial court on the findings of that court.

28. I shall start with the issue of age of both PW1 and PW2. There is no doubt that proof of the age of the complainant is critical in a case of this nature, because the punishment to be meted out by the court depends on the age of the victim. See ***Hillary Nyongesa versus Republic Eldoret High Court Criminal Appeal no. 123 of 2009*** as well as ***Kaingu Elias Kasomo versus Republic Malindi Court of Appeal Criminal Appeal No. 504 of 2010.***

29. In the case of ***Joseph Kieti Seet versus Republic [2014] eKLR the High Court in Machakos*** held, and I agree, that "***The age of a victim can be determined by medical evidence and other cogent evidence.***" In the instant case, the fathers of PW1 and PW2 testifying as PW4 and PW5 respectively produced child health clinic cards respectively as proof of the age of the two children. I am satisfied that the child health cards constitute other cogent evidence to prove age. The record does not show that during cross-examination, the appellant punched any holes into the evidence touching on the age of both PW1 and PW2. I punch no holes in it either.

30. The second issue for determination is one of penetration. PW1 and PW2 each testified that the appellant inserted his penis into their vaginas and that each one of them felt pain when he did so. PW1 and PW2 gave this narrative to PW3, PW4, PW5 and even PW6. They also told the same story to PW7 who also examined them and established that the presence of pus cell, red blood cells and pain and redness to the vagina of PW1 was a sure sign of penetration. I accept that evidence, even if there was no DNA done in the case. PW1 and PW2 also had missing hymens, though penetration does not necessarily result in breaking of hymen. The hymen could also be broken due to other factors. But in this case I am satisfied that PW1's vagina was penetrated during the defilement.

31. I am also satisfied that there was penetration to PW2's vagina. The vagina was red and painful and according to PW7 this was evidence of penetration. PW2's hymen was also missing. There is no doubt therefore that the prosecution proved the second ingredient for the offence of defilement.

32. The last issue for determination is whether it is the appellant who, with his penis penetrated the vaginas of both PW1 and PW2.

The two children gave a vivid description of how the appellant went to where they were playing around 3.00pm on 15th day of November, 2016 and lured them to M's home and into the nearby bush where he made them remove their clothes and then defiled them in turns.

33. In her judgment, the learned trial court stated, in part as follows:- ***"I also observed the complainants' demeanor throughout their testimony. Both of them were eloquent and [consistent in their evidence] in chief and on cross examination. They were very specific in their narration of what transpired. I am convinced that they told the court the truth. I believe in their testimonies."*** The learned trial court concluded that on the strength of the evidence that was before court, the question of mistaken identify did not arise, and that the appellant was positively identified and recognized as the complainants' assailant.

34. I have myself gone through the record and I wholly agree with the learned trial court's finding on the issue of identification of the appellant as the complainants' assailant. The two girls knew the appellant by name and the incident took place during the day, thereby ruling out any mistaken identity.

35. For all the above reasons, I find no merit in the appellant's appeal on conviction.

36. The remaining issue is one of sentence. The sentence of life imprisonment imposed by the learned trial court was lawful as by law provided. But since the Supreme court decision in ***Francis Karioko Muruatetu & others versus Republic [2017]eKLR,*** jurisprudence on mandatory sentences has developed to the effect that mandatory sentences such as death fro murder and other capital offences, deprive the court of its discretion to pass a sentence that is commensurate with the circumstances of the case. In the case of the death sentence, the Supreme Court declared it unconstitutional and following that decision the Court of Appeal has proceeded and commuted death sentences to either life or other appropriate terms.

37. Regarding the strict sentences under the Sexual Offences Act, the Court of Appeal in ***Denis Kinyua Njeru versus Republic c[2017]eKLR*** held that, "***The penalties under the Sexual Offences Act, may be described as "straight jacket" penalties leaving no room for exercise od any discretion by the sentencing court....."*** I had held such view as well, until the Court of Appeal decision in ***Evans Wanjala Wanyoyi versus Republic [2019] eKLR*** held, citing the earlier decision in ***Christopher Ochieng versus Republic [2018] eKLR*** and ***Jared Koita Injiri versus Republic Kisumu Criminal Appeal no. 93 of 2014*** (of which this court had inadvertently not noted earlier),

".....on the basis of the mandatory sentence stipulated by section 8(1) of the Sexual Offences Act, and if the reasoning on the Supreme Curt was applied to this provision, it too should be considered unconstitutional on the same basis ….....Needless to say, pursuant to the Supreme Court decision, we would set aside the sentence of life imprisonment imposed and substitute it therefore with a sentence of 30 years imprisonment from the date of sentence by the trial court."

38. I am inclined to adopt this progressive approach to dealing with the strict sentences under the Sexual Offences Act, and to accordingly interfere with the sentence in this case. I note that, the two complainants were aged just under 7 and 10 years respectively, and must have looked forward to a full and happy childhood. However, their innocent childhood was rudely interrupted by the appellant's actions which can only be described as barbaric.

39. Accordingly, I set aside the sentence of life imprisonment imposed upon the appellant by the learned trial court and in lieu thereof I impose a sentence of thirty (30) years imprisonment on each of the two counts with effect from 13th July 2018 when the appellant was first sentenced. The two sentences shall run concurrently.

Conclusion

40. Apart from the necessity to interfere with the sentence, the appellant's appeal on conviction be and is hereby dismissed. Right of Appeal within 14 days from the date of this judgment.

41. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Meru on this 24th day of July, 2019

F. GIKONYO

JUDGE

In the presence of

1. Kirimi for Appellant

2. Namiti for Respondent

3. Mwenda – Court Assistant