Case Number:	Criminal Appeal 88 of 2017
Date Delivered:	23 Jul 2021
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Hannah Magondi Okwengu, Jamila Mohammed, Stephen Gatembu Kairu
Citation:	Richard Mogaka Kibio v Republic [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Criminal Appeal 178 of 2012
Case Outcome:	Appeal partly allowed.
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, GATEMBU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 88 OF 2017

BETWEEN

RICHARD MOGAKA KIBIO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Kimaru, J.) delivered on 24th February, 2016

in

High Court Criminal Appeal No. 178 of 2012)

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JUDGMENT OF THE COURT

1. This is a second appeal in which the appellant, Richard Mogaka Kibio, is challenging his conviction and sentence for the offence of defilement. The charge against him before the Chief Magistrates Court at Kibera, Nairobi was defilement of a child contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act. The particulars were that on 20th February 2010 in Nairobi within the then Nairobi Area Province, he committed an unlawful act by inserting his male genital organ (penis) into the genital organ of a female (vagina) of JKM a child aged 14 years which caused penetration.

2. The facts as established by the prosecution before the trial court were that the 14-year-old JKM was at the material time living with her father in their single room home in Nairobi. Her mother lived upcountry. Her brother's room was adjacent. On 20th February 2010, JKM's father, RMO (PW3), who worked for a security company left home at about 4.00 p.m. to go to work, leaving the appellant in his son's room.

The son had at the time gone to the rural home. JKM was in school at that time.

3. In the evening at about 9.00 p.m., JKM went to her brother's room to deliver ugali which she had cooked. There was electricity in the room. She found the appellant on the sofa watching TV. She placed the ugali on the table and left. She returned later to collect the plate. As she did so, it was her testimony that the appellant rose from the sofa, locked the door, grabbed her, and threw her on the bed and defiled her. She went on to say that she tried to pull herself away from the appellant; that she was shouting but the appellant increased the volume of the TV to drown out her shouting; that after he had finished defiling her, he opened the door, and she ran out half naked returning to her house where she slept alone until the following morning as her father was at work that night. Upon the father's return from work the following morning, she reported to him what had happened the previous evening.

4. JKM's father, RMO (PW3) stated that on getting home from work on morning of 21st February 2010, he found his daughter crying; that on inquiring from her,

"…what was wrong, she told me the previous night she had cooked supper and took food to Richard Mogaka at night at 9.00 p.m., and when she went back to get the plate, the accused person grabbed and raped her, she said she feared as the accused person put a loud volume on the T.V and the radio…"

5. He stated that on looking at her, he saw blood at the back of her legs and that she was trembling; that he then called the appellant and asked him what had happened but he did not answer; that he then took his daughter to hospital and then proceeded to the police station.

6. Dr. Zephania Kamau (PW2) of Police Surgery Nairobi examined JKM on 23rd February 2010 at Nairobi Women Hospital where she had been admitted having presented with a history of rape. On examination, he noted that her external genitals were normal, her hymen was torn, and her posterior vagina was torn, and it oozed blood. He took her blood-stained clothes and sent them to the Government chemist for analysis. He completed and signed a P3 Form which he produced as an exhibit before the trial court.

7. Albert Kathure Mwaniki (PW4), a government analyst at Government Chemist Nairobi examined JKM's blood-stained clothes to establish presence of semen or spermatozoa but found none. He formed the opinion that the blood stains on the clothes was from the complainant as her blood group was O, whilst that of the appellant was blood group A. In his analysis, the blood stains had no relation to the appellant and could not tell "*whether the accused raped or did not rape the complainant*."

8. Dr. David Thuo (PW5) a medical doctor at Nairobi Women Hospital produced a medical report prepared by Dr. Mulombe who had examined JKM. Dr. Mulombe had since died. The report showed that JKM was examined at that hospital on 21st February 2010 and admitted; that she was distraught; that vaginal examination showed bleeding, and *"revealed no vagina or cervical tears, the hymen was absent, she was discharged later, diagnosis was that of sexual assault."*

9. The last prosecution witness was the investigating officer, Police Constable Jackline Muthuli (PW6). At the material time, she was attached to Kilimani Police Station where the incident was reported. She interviewed JKM and her father RMO at the station on 22nd February 2010 and recorded their witness statements. According to PW6, JKM narrated to her that the appellant is a friend to her brother; that the appellant was staying in the brother's room and had been there for four to five days; that in the evening in question, she took food to the brother's room and on returning to collect the plate, the appellant *"put loud music and attacked her"*. PW6 stated that JKM looked traumatized and was in pain and bleeding from her vagina.

10. PW6 stated further that on interrogating the appellant about the incident, *"he agreed he was staying at the house of the complainant's brother, and he admitted he had defiled her and wanted an agreement for settlement"* but *"refused to record a statement to the effect";* and that he thereafter charged the appellant with the offence. PW6 produced the original birth certificate relating to JKM.

11. In his defence, the appellant stated that he had lived in the house of JKM's brother for about a week as he waited for transport to enable him go back to Kisii; that JKM used to prepare food for them; that he was *"left in the house alone watching TV"* when JKM came and told him that she had notes to read; that he told her to go and read from the house but she insisted that she wanted to watch

TV where he was. He went on to say:

"I told her I was not comfortable and if her dad knew it would be bad. She told me she would watch a program and she would leave. I told her to go to the house and after three attempts to chase her away she went away and the following day her father came back from work and the father spoke to her and he came and he ordered me to open the house."

12. The appellant explained that he then woke up and accompanied JKM's father to where JKM was where he (RMO) accused him of having raped his daughter; that RMO picked a walking stick and beat him up and tied him with a rope; that RMO took JKM to hospital and he too was taken to hospital where he denied having raped her; that the police came and he was taken to the police station where he was forced to record a statement after which he was charged with the offence.

13. The trial magistrate was satisfied that there was no doubt that the ingredients of the offence had been established by the prosecution to the required standard; that on the face of the birth certificate, the age of JKM was established as was penetration; and that the evidence placed the appellant at the scene of crime. The trial court found the evidence of JKM *"very consistent and clear as to what transpired that night"* and had no doubt that she *"was talking the truth"* and her evidence was *"credible, consistent and corroborated by evidence of all other prosecution witnesses"*. With that, the trial court convicted the appellant for the offence of defilement and subsequently sentenced him to imprisonment for a term of 20 years.

14. On appeal, the High Court (***Kimaru, J.***) after reviewing and analyzing the evidence expressed:

"It is the duty of this court to closely examine the surrounding circumstances of the case in order to determine whether the witnesses were honest. From the evidence on record, it is clear that the appellant was placed at the scene. The issue for determination therefore would be who between the complainant and the appellant is telling the truth regarding the events of the night in question. This court has examined the proceedings during the trial. It is clear the complainant was consistent in her evidence. This was not shaken during cross examination. It was clear that the appellant sexually assaulted her. The accounts given by PW 3, PW 5 and PW 6 are consistent in the fact that the complainant appeared distraught. From careful examination of the surrounding circumstances of the case, this court is satisfied that the complainant was truthful in her evidence."

15. Like the trial court, the learned Judge concluded that the prosecution had established all the ingredients of the offence to the required standard of proof and upheld the conviction and sentence.

16. In his grounds and amended supplementary grounds of appeal the appellant complains that the investigations were shoddy and shallow; that the issue of dock identification was not properly addressed; that Section 124 of the Evidence Act was not observed; that there were contradictions and inconsistencies in the prosecution evidence; that Section 198 of the Criminal Procedure Code in relation to language used in court was not observed; that the medical evidence did not support the conviction; that the court did not consider that there was a grudge; that the prosecution did not prove its case to the required standard; that the age of the victim was not proved; that no reasons were given for the rejection of his defence; and that the courts below failed to observe "various aspect" during sentencing.

17. During the virtual hearing of the appeal on 5th May 2021, the appellant relied entirely on his written submissions. He urged that the investigations carried out by the prosecution were shallow; that the prosecution relied on hearsay information; that the

prosecution failed to prove its case beyond reasonable doubt; that the trial court relied on dock identification which is unreliable as held in ***Walter A. Omolo vs. Republic (1991) eKLR***; that the testimony of the victim, JKM, was not truthful and the prosecution case was not free from contradictions and inconsistencies; that the claim by JKM that she screamed is incredible as no member of the public came to her rescue; that the first appellate court failed to discharge its mandate to review and reevaluate the evidence as required. ***Okeno vs. Republic [1972] EA 32*** was cited.

18. He submitted further that the medical evidence was not duly considered, and neither was he given access to it; that penetration was also not established; that there was no tangible evidence linking him to the offence; and that his sworn defence was not given adequate consideration.

19. Conceding the appeal, learned counsel ***Gitonga Muriuki*** for the office of Director of Public Prosecution submitted that penetration was not proved; that the trial court relied on the evidence of a single identifying witness without corroboration as required under Section 124 of the Evidence Act; that there was no positive identification as the victim had not met the appellant before and she did not know him; that the issue of identification was not properly handled; that although the medical report indicated that JKM's hymen was absent, there was no indication when it was lost; that the evidence of the medical doctor and the Government analyst left a lot to be desired and was generally unreliable; and that the first appellate court failed to properly reevaluate the evidence.

20. We have considered the evidence, the appeal and the submissions. On a second appeal such as this, the jurisdiction of the Court is by reason of Section 361(1)(a) of the Criminal Procedure Code restricted to matters of law. This was underscored in ***Karani vs. Republic [2010] 1 KLR 73*** where the Court expressed that:

"By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

21. Bearing that in mind, the principal question in this appeal is whether the prosecution established its case against the appellant to the required standard. Related to that is the question whether the first appellate court discharged its duty of reevaluation and reappraisal of the evidence.

22. On the question whether the prosecution discharged its burden of proof to the required standard, both courts below interrogated whether the ingredients of the offence of defilement, namely, age of the victim, the identity of the perpetrator and penetration, were established.

23. On the identity of the defiler, it was the testimony of the victim, JKM, that the appellant was residing in her brother's room for a few days and that on the evening in question she served him food in that room. JKM's father was also aware of the appellant's presence in his son's room when he left for work on 20th February 2010 at 4.00 p.m. The appellant himself stated that he was living in that room "*for about one week*" as he waited to return to Kisii. He confirmed that JKM was with him in her brother's room in the evening in question save that his version of events was that while she insisted on watching TV in the room, he asked her to leave because he "*was not comfortable and if her dad knew it would be bad.*"

24. Based on the foregoing, there is no doubt that the appellant was at the scene of crime. The only question was whose version of what transpired in that room was to be believed. Both courts below concluded that JKM was a truthful witness. On his part, the trial magistrate after reviewing and analyzing the evidence stated:

"I therefore find be evidence of the complainant very consistent and clear as to what transpired that night and I have no doubt in my mind that she was talking the truth. No wonder in cross examination the accused person had not much to ask the complainant."

25. On appeal, the learned Judge of the High Court in determining who between the appellant and the complainant was telling the truth regarding the events of the night in question also concluded, upon reviewing the evidence, that the evidence of the complainant was consistent and that it was not shaken during cross examination.

26. There is therefore, concurrence by both courts below that there was sufficient evidence placing the appellant at the scene of crime and that JKM was a truthful witness. On a second appeal such as this, we have a duty:

"…to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." *Adan Muraguri Mungara vs. Republic [2010] eKLR."*

27. As to whether penetration was proved, there was the testimony of JKM who gave a detailed account of what happened in her brother's room when she returned to collect the plate. In her words:

"He removed all of my clothes …a skirt and jacket and a panty he removed the clothes as he pressed me with one hand as he lay on top of me and with the other hand he removed my clothes. I lay on my back he lay on top of me and he then removed a trouser he wore and he did to me bad habit. Tabia Mbaya he had not worn underwear he inserted his urinating organ into my organ for urinating. He used his thing (penis) and he inserted it in inside my vagina. I felt pain and I bled because my petticoat and panty had blood."

28. She reported the incident to her father immediately he got home the following morning and remained consistent even as she narrated to the investigating officer (PW6) what had transpired. The evidence of Dr. Kamau (PW2) who examined JKM on 23rd February 2021 at the hospital where she was admitted confirmed that although *"her external genitals were normal, her hymen was torn, and also the posterior vagina wall was torn, it oozed blood."* The medical report of Dr. Mulombe which was produced by Dr. Thuo (PW5) also indicated that medical examination of JKM *"revealed no vagina or cervical tears, the hymen was absent"* and was discharged with diagnosis of *"sexual assault"*.

29. Those medical reports corroborated the testimony of JKM, and it is somewhat baffling that learned counsel for the ODPP conceded the appeal on grounds that penetration was not established. Moreover, under the proviso to Section 124 of the Evidence Act, the trial court, satisfied as it was that JKM was telling the truth for the reasons indicated was entitled to convict based on her evidence.

30. We are satisfied that the High Court duly discharged its duty and subjected the evidence ***"to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336)"*** and arrived at its own well-founded findings and conclusions. See ***Okeno vs. Republic [1972] EA 32.***

31. As regards sentence, the trial court expressed that the sentence of 20 years imprisonment was the minimum sentence prescribed and considered its hands tied. The appellant in mitigation had expressed that he was remorseful, that he was a first offender and the bread winner of his family and that his wife was sickly and sought mercy. The High Court did not interfere with the sentence.

32. Since the pronouncement by the Supreme Court in the case of ***Francis Karioko Muruatetu & Another vs. R (2017) eKLR*** this Court has entertained pleas to reconsider minimum sentences in sexual offences and has applied the principle that sentencing is a judicial function. We are inclined to interfere with the sentence. We think a sentence of 10 years is commensurate. We accordingly set aside the sentence of 20 years and substitute therefor a sentence of 10 years from the date of conviction on 18th May 2012. To that extent only, does the appeal succeed. The appeal on conviction fails and is hereby dismissed.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR