OMM v Republic (Criminal Appeal E016 of 2022)
[2024] KEHC 9080 (KLR) (22 July 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E016 OF 2022

BM MUSYOKI, J

JULY 22, 2024

BETWEEN

OMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence in Githunguri Principal Magistrate's Court (Peter Muholi PM) sexual offence case number 18 of 2020 dated 4th March 202)

JUDGMENT

1. The appellant was convicted of offence of defilement contrary to Section 8(1) as read together with Section 8(2) of the *Sexual Offences Act* number 3 of 2006 now Chapter 63A of the Laws of Kenya. The particulars of the charge were that on 25th May 2020 at around 1500 hours at (Particulars withheld) village (Particulars withheld)sub county within Kiambu County intentionally and unlawfully caused his genital organ namely penis to penetrate into the genital organ namely vagina of JIM. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He went through full trial and on 4-03-2022, the court found him guilty of the main charge and sentenced him to serve 25 years in jail.

2. Aggrieved by both the conviction and sentence, the appellant filed memorandum of appeal which I believe should a petition of appeal on 8-04-2022 in which he has raised the following grounds;

    1. The trial court erred in both point of law and fact by failing to observe that the prosecution's case was marred with inconsistencies and contradictions and hence did not prove their case beyond reasonable doubt.

    2. The trial court erred in both points of law and fact by not finding that the evidence by the prosecution cannot sustain a conviction.

3. The trial court erred in both point of law and fact by upholding conviction sentence without observing that the entire prosecution case was impeachable under Section 163(1) of the *Evidence Act* thus unworthy to be relied upon.

4. The trial court erred in law and facts by failing to give the appellant's defence adequate consideration.

5. The trial court erred in both point of law and fact by failing to observe that the prosecution failed to recall crucial witnesses to prove its case against the appellant as provided for in Article 50(2)(c) of *Constitution*.

3. Despite the obvious grammatical errors in the stated grounds of appeal, I am able to understand what the appellant is complaining about. This is a first appeal and as an established principle of law, I have the duty to re-evaluate and re-examine the evidence produced before the lower court and come to my own independent conclusion always warning myself that I did not have the benefit of taking the evidence and seeing the demeanor of the witnesses.

4. PW1 was the victim. In her voire dire, she stated that she was seven years. She testified that on the material day, she was playing with two other children who she named when the appellant called her aside and asked her to accompany him to go and eat a cake. The complainant even mentioned the name of the assailant as Baba Mugambi. The appellant took her to a field with nappier grass where he removed her trousers and defiled her. She said that she felt pain and started crying. The appellant covered her mouth with his handkerchief to stop her from crying. When the appellant was done with defiling her, he gave her 20 shillings and warned her not to tell anyone of what he had done. She told the court that after the appellant finished, he wiped her with his handkerchief before leaving. She was clear that she saw white thing which the appellant put in her which he wiped and also wiped himself. The two then heard the victim's sister calling her name and at this point the appellant left through the nappier grass. As the victim was coming out of the nappier grass field, she met her sister who was calling her and they went to the shop for sweet and 'mutura'. She later confined to her sister who later reported to her mother who took her to hospital. The victim added that the assailant was known to her as she used to see him around their place and he used to pick tea with her mother and others. She knew him as their neighbour although not close.

5. In cross examination, the victim maintained her story and did not contradict herself. She denied that her mother had told her to come to court and lie about the incident. She added that she went home and changed her clothes because her trouser had some white things.

6. PW2 was the victim's ten-year-old elder sister who said that she was in class 4 at (Particulars withheld) primary school. She narrated that on the material day, she finished washing utensils and started looking for her younger sister when she saw the sister's two friends who she mentioned by name. She asked the friends where the victim was who told her that the victim had gone with a man and they started looking for her. She loudly called out the victim by her name then saw her emerging from a nappier grass field beside the road with Kshs 20/= in her hands. They went home and as they were taking bath, she noticed that the victim's pants had some blood and white things. On enquiry, the victim told her that 'Guka' who used to go to church with them had done to her 'tabia mbaya'. Out of fear, the two girls did not report to their mother the same day. When the victim started experiencing pain the following day, PW2 told their mother. The witness stated that she knew the appellant well as Baba Mugambi as during corona period, she saw him many times as he sold milk and fruits. She added that she had seen the appellant on top of the victim some other time when their mother was admitted in hospital and they were under the care of the appellant. She positively identified the appellant as the perpetrator.

7. PW3 was the victim's mother who told the court that she was a tea picker. On 26-05-2020 at about 7 pm, PW2 went to her as she was preparing supper and asked her whether she was aware that the victim was doing tabia mbaya with Guka. The appellant who was a neighbour was well known to her. When she asked the victim, she confirmed that the appellant had done 'tabia mbaya' to her which she understood to mean that the appellant was defiling the victim and the last one was on the previous day. She narrated how victim and PW2 explained to her and the next day she took the child to police station where she made a report and she was referred to hospital for examination. She was later issued with a P3 form and treatment notes. She added that she brought the child back the following day for examination and filing of P3 forms. She confirmed that the victim was seven years. The appellant was then arrested after three days.

8. In cross examination, the witness denied that she had an affair with the appellant and that she was using the case as a revenge. She maintained that she did not have any differences with the appellant. She also denied that she colluded with the doctor to frame the appellant.

9. PW4 was a Doctor Sharon Chepchumba who produced treatment notes showing the treatment the victim had received. She said that the victim was having discomfort in her private parts. Upon examination, the victim was found to have lacerations on the labia majora and labia minor. Her hymen was also absent. The conclusion of examination was that the victim had been defiled and the injuries were assessed as grievous harm.

10. The last witness was the investigations officer. She summarised the evidence given by the other witnesses as she had received it. She managed to arrest the appellant at Gitiha Technical College where he was working as a watchman. The officer maintained that the child had neem defiled severally but the last one was on 25-05-2020.

11. After the close of the prosecution case, the trial court then presided over by Honourable B. Ojoo Senior Principal Magistrate put the accused to his defence. After Section 211 of the *Criminal Procedure Code* was explained to him, the appellant chose to give unsworn statement and said that he would not be calling any witnesses.

12. When the matter came for defence hearing on 28-01-2022, the presiding Magistrate changed from B. Ojoo to Honourable P. Muholi Principal Magistrate. There is no indication whether Section 200(3) of the *Criminal Procedure Code* was complied with. The raw and typed proceedings show that after the coram of the date was recorded, the appellant went on to give unsworn statement. I will come to this later.

13. The opening part of the appellant unsworn statement looks misleading which I attribute to an error or a mix up. It states 'My case, we were friends with the accused and we disagreed and after one year he came and said I had defiled his children, the police told us to go and agree and I said that I do not know anything'. This is obviously erroneous. I believe the word 'accused' should have been 'the complaint's mother'. Be that as it may, the appellant denied committing the act and alleged that the complainant's family wanted money from him which he did not have. He alleged that the offence was reported after one and half years.

14. The appellant in his submission has sought to amend his petition under Section 350 (c) of the *Criminal Procedure Code*. He wants to introduce new grounds of appeal in place of those in his petition. The grounds he seeks to introduce in his amendment are;

    1. That the trial court erred in matters of law and fact by failing to adhere to the dictates of Section 200(3) of the *CPC* as the case was part heard when the convicting magistrate assumed jurisdiction.

2. That the trial court erred in matters of law and fact by convicting the appellant herein for the offence of defilement despite the prosecution failing to prove its case beyond reasonable doubts as required by law, considering the requirements of demeanor, within the meaning of Section 200 of *CPC*.

3. That the trial court erred in matters of law and facts by sentencing the appellant herein to an excessive sentence, contrary to the law, considering his age of 70 years and the world's Normal Life Expectancy Rate.

15. The grounds set forth are not quite different from the grounds in the original petition safe for the first ground which attacks the judgment for failure to adhere to Section 200(3) of the *CPC*. Since the said one ground is a matter of law, I will not grant the leave to amend the petition but I will consider all the arguments the appellant has put forth around it in his submissions.

16. Section 200(3) of the *Criminal Procedure Code* states that;

'Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.'

17. In the proceedings of the lower court, the appellant was not represented by an advocate in the proceedings but the courts always have the duty to ensure that all mandatory procedures are adhered to in a trial. It is not recorded whether the said Section 200(3) of the *Criminal Procedure Code* was complied with. The appellant's submissions that the same was not complied with are therefore indisputable.

18. The effect of failure to comply with the provisions of the Section is well settled. It is an established legal position that such a trial must be invalidated as a nullity. The appellant has cited David Kimani Njuguna vs Republic, criminal appeal number 294 of 2010 and stated that the Court of Appeal held that provisions of section 200(3) are mandatory and a succeeding judge or magistrate must inform the accused person directly or personally of his right to recall witnesses. This authority was not provided to me and my search for the same did not bear fruits. I have however sought reliance of *Morris Ochieng Odour vs Republic* (2020) eKLR where the court held that

> 'Accordingly I find and hold that failure by the trial magistrate to comply with section 200(3) of the *Criminal Procedure Code* makes the trial court's conviction of the appellant herein invalid and all the subsequent proceedings veiled with unconstitutionality and cannot stand. In the end, I find the conviction of the appellant for the offence of robbery with violence to be a nullity and I proceed to quash it and set aside the sentence imposed on the appellant.'

19. I declare the trial of the appellant a nullity for failure of compliance to Section 200(3) of the *Criminal Procedure Code*. The effect of a nullity is that it makes the process so declared null and void ab initio. It is as if the said process never took off. In the circumstances, the entire trial of the appellant in the lower court his nullified for a simple process which would not have taken the court more than five minutes. It is regrettable and unfortunate considering that this is a serious offence which touched on the right and life of a young soul. A seven-year-old child who with her family took the time and went through a full court process which many shy away from.

20. Having declared the trial a nullity, what is the appropriate orders should I grant? The appellant asks for an acquittal. I have agonised over this unfortunate issue. And that is why I took the time to reproduce the evidence of the parties as recorded in the lower court. I have an option of ordering a retrial if the circumstances of the case allow. A retrial would normally be ordered where the proceedings are

defective or illegal and in circumstances that would not prejudice the accused person and the court considers the admissible evidence so far adduced enough as to result in a conviction if a retrial was to be done. I have formed the opinion that this is such a case.

21. I find support of my above position in *Joseph Lekulaya Lelantile & Another vs Republic* (2002) eKLR where the Court of Appeal held that;

> 'An order for retrial is made only where the original trial was defective or illegal. It is not to be made merely to provide the prosecution with an opportunity to improve their case or correct their mistake on their original trial or to fill up gaps in their evidence'.

22. Without saying more on the evidence as produced so that I do not compromise the future proceedings of the matter, I hold that this is a case suitable for a retrial. I therefore allow this appeal and make the following orders;

    1. The conviction of the appellant in Githunguri Senior Principal Magistrate's court sexual offence number E018 of 2020 is quashed and the sentence thereof set aside.

    2. The matter is remitted back to the lower court for a fresh trial before a magistrate other than Honourable B. Ojoo (CM) and Honourable P. Muholi (PM).

    3. The appellant shall be produced for the purpose of the retrial before the lower court within the next fourteen (14) days from the date of this judgment and the trial shall be expedited and the matter heard on priority basis.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.