Makokha v Republic (Criminal Appeal E029 of 2021)
[2023] KEHC 20560 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20560 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E029 OF 2021

JN ONYIEGO, J

JULY 7, 2023

BETWEEN

DISMASS MAKOKHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentence and conviction by Hon. Mbuteti in CM's Court in Garissa Criminal Case (Sexual Offence) No.51 of 2019 delivered and delivered on 30.02.2021)

JUDGMENT

1. The appellant herein filed an undated petition of appeal on August 8, 2021 challenging his conviction and sentence by the trial court for the offence of trafficking for sexual exploitation contrary to section 18(1)(b)(2) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the offence were that on October 1, 2019, at Nzoia Location of Bungoma County intentionally arranged the travel of MM from Bungoma to Garissa, the borders of Kenya believing that the said MN would likely be defiled by Phillip Nyongesa Wafula after the journey. The appellant was tried and thereafter convicted of the offence herein and sentenced to a fine of Ksh 2,000,000.00 in default, to serve fifteen (15) years imprisonment to be computed from the day he was arrested.

3. It is that conviction and sentence that necessitated the instant appeal wherein the appellant raised the grounds of appeal which I have collapsed to wit; whether the learned magistrate erred in both points of law and facts in convicting him and thereby imposing a harsh and excessive sentence; that the trial magistrate totally disregarded and further dismissed the appellant's mitigation and defence without giving reasons for the same.

4. During the hearing of the appeal, the court directed that parties file their written submissions to which only the appellant complied. It was submitted that the trial court erred by relying on the evidence of a single witness without warning itself of the repercussions of the same. That the prosecution relied

on the prosecution's evidence which was riddled with inconsistencies as demonstrated by PW4 at the first instance who denied knowing the appellant but later on admitted that he knew him; that PW6 testified that the appellant was arrested in a hotel while PW4 testified that he was arrested in a farm.

5. It was his submission that the learned trial magistrate failed to take cognizance of the appellant's mitigation and defence. In regards to sentence, the appellant decried the sentence meted out by the trial court thereby arguing that the same was severe and harsh and not in cognizance of his poor background. He prayed that the appeal herein be allowed, conviction quashed and the sentence set aside.

6. The respondent on the other hand conceded to the appeal citing reasons that the section under which the appellant was charged has since been repealed. That section 18 of the *Sexual Offences Act* was revised in the year 2019 thus repealing the section under which the appellant was charged.

7. Having considered the submissions of the appellant and further analyzed the evidence before the trial court, the issue for determination is whether the appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.

8. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in *Okeno v Republic* [1972] E.A. 32 and re-stated in *Kiilu and another v R* (2005) 1 KLR 174 where it was held that the evidence as a whole is to be exposed to a fresh and exhaustive examination by the court and thereby weigh conflicting evidence and thereafter draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it is based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles [See *Gunga Baya & another v Republic* [2015] eKLR].

9. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is placed on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the cases of *Woolmington v DPP* 1935 AC 462 and *Miller v Minister of Pensions* 2 ALL 372-273.

10. In recognition of the above, PW1, MWN testified that on September 30, 2019, her mother sent her to a shop when she met the appellant. That being a person known to her, the appellant called and locked her in his house. She stated that after some time, the appellant's wife arrived and thereafter cooked some meal which they all ate. She continued to state that on the following day, the appellant bought two tickets at the bus station and so they boarded a bus to Garissa. On the following day, the appellant took her to Phanice and informed her that she was his visitor. That thereafter, the appellant took her to his house in the farm where he defiled her repeatedly. It was her evidence that on October 18, 2019, the appellant dumped her at Phanice's house where she stayed until the time that PW2 together with some police officers rescued her.

11. PW2, MWB testified that on September 30, 2019, upon arriving at his house, he found his wife cooking but noticed that PW1 was missing. That he was informed that she had gone to buy medicine and therefore, he embarked on searching for her. It was his evidence that together with his wife, they reported the matter to Nzoia Police Station as they continued to search for PW1. That on October 13, 2019, he received a call from a private number prompting him to go back to Nzoia Police Station where he was referred to Bungoma Police Station.

12. That the private number was traced to Garissa and therefore, he was given a letter addressed to Iftiin Police Station seeking for help. He recalled that upon reaching there, the said number was traced from a

certain house whereupon reaching, they found one Phillip, Phanice and Alex. That they were informed that PW1 was brought in by the appellant after which he disappeared.

13. PW3, Alex Wanyonyi testified that on October 4, 2019 upon arrival from work, he found the appellant at his house wherein he stated that he enquired who PW1 was. That as a response, the appellant shrugged off the question by saying that he was tired and therefore would answer later. That on the next day, he still enquired from the appellant on the identity of PW1 but still, the appellant shrugged off the question. He reiterated that the appellant was responsible for bringing the girl to Garissa.

14. PW4, Phanice Mukwana stated that on October 4, 2019, while in her house, she saw people enter her gate and the same turned out to be the appellant and PW1. That they asked for water and thereafter left. She recalled that after some days, the police arrested them for being suspected to have been behind PW1 leaving home.

15. PW5, Jeremiah Mosibei recalled that on October 18, 2019, he was requested by the OCPD Iftiin Police Station to examine PW1 as she had reportedly been defiled. That she examined the complainant and from the same, reached a conclusion that indeed, PW1 had been defiled for the hymen was freshly broken although the same showed signs of healing and further, there were epithelial cells on her vagina. She produced the P3 Form as exhibit in court.

16. PW6, Charles Odongo stated that he was the investigating officer after PC Kipkemoi Rotich was transferred. That PW2 had reported a matter to wit that her daughter, PW1 was lost. That information was that one of her relatives had taken her and brought her to Garissa. It was his evidence that PC Kipkemboi and B went to a house in [Particulara Withheld] Game where PW1 was believed to be harboured. It was his further evidence that after interrogations of one Philip, Alex and Phanice, he established that the appellant herein was responsible for having trafficked the minor from her home place. He produced the birth certificate for PW1 and thereafter identified the appellant in the dock. At the close of the Prosecution's case, the Court considered the evidence tendered by the prosecution and placed the accused person on his defence.

17. The appellant testified that on October 19, 2019, he was at his employer's farm when he was sent by the said employer to transport banana seedlings to another farm. It was his evidence that after having completed his work for the day, the police arrested and further assaulted him. He denied ever committing the said offence but conceded that he knew PW1 as she was a daughter to his neighbor. He testified that he was equally disturbed by the fact that PW1 was in Garissa and demanded reasons on the same from Phanice. He blamed his misfortunes on Linet, his wife whom he claimed he did not pay dowry for. He stated that Alex was responsible for calling PW2 and given that there exists a grudge between his father and PW2, he was readily implicated for having committed the offence herein.

18. As already noted, the appellant was charged with the offence of trafficking for sexual exploitation contrary to section 18(1)(b)(2) of the *Sexual Offences Act* No 3 of 2006. The charge against the appellant was preferred sometime back on 01.10.2019 and the law that the respondent used to charge the appellant was noted to be under section 18(1)(b)(2) of the *Sexual Offences Act* No 3 of 2006. A look at the said Act shows that the same had been amended by repealing the said section 18 under which the appellant was charged. It therefore follows that the appellant was charged against a section of law that was not in existence as the same had been repealed. The same was not controverted by the respondent who conceded to the appeal herein.

19. It is trite that an accused person should be charged of an offence known in law. The Court of Appeal in *Sigilani v Republic* (2004) 2 KLR, 480 held as follows: -

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence".

20. In the case herein, the trial magistrate conducted the hearing of the case to its end but of importance to note is the fact that the prosecution informed the court that it intended to rely on some documents that had previously been adduced in a different case involving the appellant herein for having defiled the complainant PW1.

21. The only issue that calls for consideration is whether the appeal should be allowed in its entirety or a retrial ordered. The principles governing whether or not a retrial should be ordered were enunciated in *Fatehali Manji v Republic* [1966] EA 343 by the East Africa Court of Appeal as follows:

> " In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person."

22. In *Mwangi v Republic* [1983] KLR 522 the Court of Appeal also held thus:

> " We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

23. I am convinced that this is not a proper case for retrial. I have in this regard particularly noted that the prosecutor during the trial stated that there was a separate sexual offence case wherein the appellant was charged for having defiled the complainant. In addition, a retrial would be prejudicial to the appellant, who has already spent close to two years in custody.

24. I therefore allow the appellant's appeal and quash his conviction for the offence of trafficking for sexual exploitation contrary to section 18(1)(b)(2) of the *Sexual Offences Act* No 3 of 2006. I also set aside the sentence of a fine of Ksh 2,000,000.00 or in default, to serve fifteen (15) years imprisonment imposed upon the appellant for this conviction, and order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 7TH DAY OF JULY, 2023

J.N. ONYIEGO

JUDGE