MKK v Republic (Criminal Appeal 59 of 2019)
[2023] KEHC 21581 (KLR) (5 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21581 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL 59 OF 2019

SN MUTUKU, J

JULY 5, 2023

BETWEEN

MKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Criminal case No. S.O 1 of 2016 delivered by the Hon. Alex Ithuku C.M at the Chief Magistrate's Court at Ngong on the 8th day of April, 2019)

JUDGMENT

Background

1. The Appellant, MKK, was charged with the offence of Attempted Defilement contrary to section 9 (1) (2) of the *Sexual Offences Act* (the Act). The particulars of the offence are that on 9/7/2016 in Kiserian Township within Kajiado County, intentionally attempted to cause his penis to penetrate the vagina of CW a child aged 10 years.

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* were that on 9/7/2016 in Kiserian Township within Kajiado County, intentionally touched the genital organ (vagina) of CW a child aged 10 years with his finger.

3. The Appellant was tried and found guilty and convicted for the main charge of attempted defilement. He was sentenced to 10 years imprisonment.

4. He was aggrieved by the conviction and the sentence and has filed this appeal challenging that decision.

Memorandum of Appeal

5. The Appellant is relying on amended grounds of appeal filed in court on March 12, 2021. The Appellant has raised seven grounds of appeal as follows:

    i. That the Learned trial magistrate erred in law and fact by convicting the Appellant on evidence which did not meet the requisite standards.

    ii. That the Learned trial magistrate failed to observe that the evidence adduced had gaps, material discrepancies, was contrary and very inconsistent.

    iii. That the Learned trial magistrate erred in both law and fact by allowing an application for the amendment of the charge sheet after the close of the prosecution's case contrary to section 214 of the *Criminal Procedure Code*.

    iv. That the Key ingredients of the alleged offence were not well established.

    v. That the Learned trial magistrate discarded the Appellant's plausible defense without outlining candid reasons for rejecting the same as stipulated in section 169(1) of the *Criminal Procedure Code*.

    vi. That the Pundit learned trial magistrate erred by shifting the burden of proof to the Appellant contrary to the general rule and practice in a criminal trial as stipulated in section 111 of the *Evidence Act* Cap 80 Laws of Kenya.

    vii. That the learned trial magistrate erred in law by allowing the case to culminate and constitute a conviction based on a completely faulty and defective charge sheet.

6. Tailored around the grounds of appeal, the Appellant raised five issues for determination as follows:

    i. Whether or not the prosecution's case was proved beyond reasonable doubt.

    ii. Whether or not the amendments that were introduced in the charge sheet contravened the law.

    iii. Whether or not the Appellant's conviction was based on a completely faulty and defective charge.

    iv. Whether or not the key ingredients and elements of the offence herein were well established and proved beyond reasonable doubt.

    v. Whether or not the Appellant's defence was plausible and if so, whether the learned trial magistrate erred by discarding or rejecting the same.

Submissions

7. The appeal was canvassed through written submissions. The Appellant filed his submissions on February 24, 2021. He addressed the first and second ground of appeal together under the first issue. He stated that the evidence by the prosecution was so underwhelming that it could not sustain a conviction and the same ought to have been dismissed in totality. He stated that PW1 contradicted herself during cross examination; that when PW1 testified in her evidence in chief, she stated that her father locked the door, got hold of her and tied her legs and hands together, threw her on the bed, removed her clothes and also removed his clothes; that her father laid on her and inserted his penis into her vagina that during this time her mother and aunt were not in the house while her brother was playing outside but that during cross examination she told the court that her mouth was gagged. He argued that it is

not possible for PW1 to have screamed when her mouth was gagged and that there it was not possible for the Appellant to penetrate her with her legs tied together.

8. He submitted that it was also not clear between PW2, the neighbor, and PW3, the teacher, who between the two reported the matter to the police. The Appellant argued that the evidence of both PW1 and PW2 raises serious doubts as to whether the alleged incident did occur or whether it was a creation of PW2 to frame the Appellant. The Appellant cited *Philip Nzaka Watu -vs- Republic* (2016) eKLR, where the court stated that:

> " It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt."

9. In regard to ground third ground, which is covered under the second issue, the Appellant submitted that on July 21, 2016 he was first charged with the offence of Defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* and that he pleaded not guilty; that the trial court on October 30, 2018 allowed the prosecution to amend the charge sheet without any oral or formal application and that the charge sheet was amended after the close of the prosecution case contrary to section 214 of the *Criminal Procedure Code*.

10. He further submitted that he was put on his defence without being given adequate time to prepare contrary to section 211 of the *Criminal Procedure Code*. He argued that these actions were tantamount to denying him his constitutional right to fair hearing as envisaged under Article 25 (c) of the *Constitution*. He relied on the case of Albanus Mwasia Mutua -vs- Republic in Criminal Appeal No. 120 of 2004 where it was held that:

> " At the end of the day it is the duty of the court to enforce provisions of the *Constitution* otherwise there would be no reason for having these provisions of the *Constitution* in the first place."

11. The Appellant argued ground 7 under the third issue on defective charge sheet. The Appellant submitted that it is confusing for the charge sheet to have stated section 9(1) (2) as the same does not state whether it is sub-section 1 clause 2 or subsection 1 and 2 of section 9. He argued that this is contrary to section 134 of the *Criminal Procedure Code* which requires every charge or information to contain a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged for it to be sufficient.

12. He submitted on issue No. 4, which covers ground 4 of the appeal, that the key ingredients were not established; that had he inserted his penis in the minor's vagina there would have been visible injuries; that the evidence of both PW4 and PW5 did not confirm this; that the evidence of lacerations on the labia and that the same could have been caused by a blunt object, as testified by PW5, is speculative and cannot sustain a conviction. He argued that the prosecution did not have sufficient evidence to sustain the conviction of attempted defilement. He cited *Charles Nega – vs Republic* Criminal Appeal no. 38 of 2015, where it was stated that:

> " When a court of law is faced with any charge on an attempted offence, care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however

strong the evidence may be if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge."

13. He argued, further, that the circumstances and the chain of events as given by PW1 were so distorted that the charge cannot be sustained.

14. He argued issue No. 5 which covers grounds 5 and 6 of the appeal, that the Appellant's defence was plausible as he gave a sworn defence and explained what happened on the day it is alleged that he committed this offence.

15. The Respondent submissions on June 10, 2022. The Respondent has submitted that six witnesses testified for the Respondent and proved beyond reasonable doubt that the Appellant committed the offence; that the evidence of PW1 and PW2 placed the Appellant at the house and that PW4 and PW5 confirmed the occurrence of the offence.

16. On the issue of the amendment of the charge sheet the Respondent argued that the trial court conducted itself within the law and cited *Hawaga Joseph Anuanga Ondiasa Vs Republic* [2001] eKLR, where the court stated that:

> " However, even if we were to hold that he did not prepare his judgment strictly in accordance with Section 169 of the *Criminal Procedure Code* this would not, of itself, mean that the conviction of the appellant was wrong or is to be invalidated."

17. On the issue that the trial court disregarded the accused's defence without considering section 169(1) of the *Criminal Procedure Code*, the Respondent submitted that the Appellant's allegations lacked merit. The Respondent relied on *Republic- vs- Edward Kirui* [2014] where the court stated that:

> " Non- compliance with the requirements of section 169 does not automatically result in the trial process being vitiated."

18. On the issue of defective charge sheet, they argued that the same could be cured by section 382 of the *Criminal Procedure Code*.

Analysis and Determination

19. I have taken time to carefully read the record of the lower court, the grounds of appeal and rival arguments in the submissions. I have decided to address one pertinent issue whose determination, in my view, may affect the direction this appeal will take. The issue I refer to is raised under ground three of the appeal namely:

SUBDIVISION - That the Learned trial magistrate erred in both law and fact by allowing an application for the amendment of the charge sheet after the close of the prosecution's case contrary to section 214 of the *Criminal Procedure Code*.

20. This ground of appeal is addressed under issue two of the issues for determination identified by the Appellant to the effect that:

Whether or not the amendments that were introduced in the charge sheet contravened the law.

21. The Appellant complains that the amendments to the charge sheet were done after the prosecution closed its case and without an application being made to amend. Further, he was not given time to prepare for his defence after the amendments were made.

22. The record of the lower court shows that on October 29, 2018, the prosecution called its 6th witness, No. 92355, PC Carolyne Atieno. After the testimony of this witness, the prosecution closed its case after which the court made a brief ruling to the effect that the accused had a case to answer and fixed defence hearing for 30th October 2018.

23. On October 30, 2019 the record shows as follows:

Date: October 30, 2019

Magistrate: Hon. S. N. Mbungi, CM

Prosecutor/State Counsel: Timoi

Court Assistant: Joy

Accused: Present

Court: Charge read to the accused in Kiswahili language which he understands and says:

Main Count – Not guilty – Plea of not guilty entered.

Alternative Count – Not guilty – plea of not guilty entered.

In line with section 211 of the *CPC* to make a sworn statement in his defence. Two witnesses to call.

24. After this record, the Appellant started to testify, followed by his two witnesses. Judgment date was set for December 14, 2018 but the record shows that judgment was delivered on January 25, 2019.

25. Section 214 of the *Criminal Procedure Code* provides that:

> Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment or the charge or by substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:
>
> Provided that –
>
> i. Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;
>
> ii. Where the charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

26. Section 214 of the *CPC* is clear that the amendments or alterations of the charge are to be made before the close of the prosecution case. This is not the procedure adopted by the trial magistrate in this matter. The amendments were made after the prosecution had closed its case and the trail magistrate had made a ruling for the case to answer. There is an outright procedural defect and error in the proceedings. This failure by the trial magistrate to follow procedure may lead to miscarriage of justice to the accused. It is also clear that the Appellant was not allowed time to digest the changes in the amended charge even though the subject matter of the offence was similar only that it changed from defilement to attempted defilement.

27. I have read the evidence adduced. I have restrained myself from commenting on it or on the other issues raised by the Appellant to avoid prejudice in this matter because in my considered view this is a matter that requires a retrial. It is for this reason that I turn to the applicable principles for declaring a matter a mistrial. A trial is rendered invalid through an error in the proceedings. A mistrial is defined in the *Black's Law Dictionary* 9the Edition as

> "a trial that the judge brings to an end, without determination on merit, because of procedural error of serious misconduct occurring during the proceedings."

28. In *R. v. Philip Ondara Onyancha* [2017] eKLR , the High Court set out the conditions for which a mistrial may be declared that it will be where the procedural defect or error is likely to cause or has caused a gross miscarriage of justice to the accused, the victims or the prosecution.

29. Further, the Court of Appeal in *R. v. Edward Kirui* [2014] eKLR, cited with approval the Indian In *Zahira Habibullah Sheikh & Another v. State of Gujarat & Others* AIR 2006 SC 1367 wherein the Indian Supreme Court stated:

> " It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted ---- Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or a mere farce and pretence --- The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

30. The trial magistrate contravened the law in his actions to allow amendments to the charge after the prosecution had closed its case and failure to allow the Appellant adequate time to prepare for his defence in view of the amended charge. It is for this reason that this court has declared the trial before the lower court as a mistrial. For this reason, as I have stated above, it will be prejudicial for this court to proceed to determine the other grounds of appeal.

31. This matter shall be referred to Ngong Law Courts for retrial before a different magistrate. I am alive that time has passed but for the sake of justice to all parties to this case, and given that judgment and sentence was pronounced in April 2019, that is four years down the line, I am confident that witnesses will be available for retrial. For ends of justice to be met, I direct that the Appellant be tried for the offence of defilement as earlier charged. There is no justification given why the charge was amended and this court having faulted that amendment, it is only proper that the trial proceed on the charge of defilement to enable due process to be accorded and justice to be served.

32. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 5TH DAY OF JULY 2023.

S. N. MUTUKU

JUDGE