Mohamed v Republic (Criminal Appeal 62 of 2022)
[2024] KECA 688 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 688 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 62 OF 2022

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

JANUARY 25, 2024

BETWEEN

ABDALLA ALI MOHAMED .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Garsen (Nyakundi, J.) delivered on 4th November 2021 in High Court Criminal Appeal No. 45 of 2019)

JUDGMENT

1. The appellant, Abdalla Ali Mohammed, was on 7th November 2019 convicted by the Senior Resident Magistrate's court at Lamu for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* and sentenced to a prison term of 30 years. The particulars of the offence, as set out in the amended charge sheet to which he pleaded not guilty, were that on the 30th day of April 2019 at [particulars withheld] Area,[particulars withheld] Location in [particulars withheld] Sub County within Lamu County, the appellant intentionally caused his penis to penetrate the vagina of AK a child aged 8 years.

2. His first appeal against the conviction and sentence was dismissed by the High Court at Malindi (R. Nyakundi, J.) in a judgment delivered on 4th November 2021.

3. In this second appeal, the appellant complains that the High Court failed to: discharge its role of re-evaluating the evidence; appreciate that the prosecution evidence was inconsistent and contradictory; and that the sentence meted on him is excessive, given his advanced age.

4. The facts, in brief, are that the complainant AK (PW1), a Grade 1 Primary School student in a local primary school, in the company of other children, went to deliver food to the appellant. Upon

delivering the food, the appellant asked the other children to leave asking the complainant to remain behind in his house where he detained her. In AK's words:

> " He told the others to leave. He then took me to bed he removed his "Mdudu" from the trouser. He put the Dudu in my private part (PW 1 Points to her vagina). He took me to the toilet and washed me. He then sent me home."

5. One of the other children who had accompanied the complainant to the appellant's house was ZS (PW2), a 7- year-old child and a Grade 1 student in the same school as the complainant. She explained that alongside the complainant, they had taken food, consisting of rice, fish, and stew, to the appellant, to whom she referred as "Uncle Abdalla"; that after the appellant had eaten, he gave the children money with her receiving Kshs. 10.00 and they went to buy chocolate leaving PW1 in the appellant's house. She stated that AK "...was inside the house. Abdalla locked the house they did bad manners. Uncle Abdalla told AK to enter he told us to go...". She went on to say that when they went back to collect the dishes, and on enquiring from the appellant where AK was, he told them that she had left.

6. The complainant's mother, SMB (PW3) recalled that on 30th April 2019 she was at home at about 4.00 a.m. (should be pm?) when a brother to the appellant, one Hassan, apparently called in. Hassan disclosed to her that he had eavesdropped on a conversation between AK and his (Hassan's) child in which AK said that at 2.00 p.m. the appellant had "done bad manners" to AK when they had delivered food to the appellant; and that Hassan asked her to report the matter to the police. With that information, PW3 enquired from her daughter, AK, what happened. AK informed her that "Abdalla had defiled her when she had taken food to him."

7. After consulting with AK's father, PW3 took PW1 to King Fadh Hospital on the same day, 30th April 2019, where Madi Sheambu (PW5), a clinical officer at that hospital, examined her. Thereafter PW3 reported the matter to the police, where she was given a P3 form which was filled out by the Doctor at the hospital.

8. Halima Baya (PW4), a housewife and the appellant's in-law and a resident at [particulars withheld] within Amu was at home on 30th April 2019. Her daughters made lunch, packed, and delivered it to their uncle Abdalla, the appellant.

9. The clinical officer, Madi Sheambu (PW5) of King Fahd Hospital was on duty on 30th April 2019 and examined the complainant who was brought in by her mother (PW3) with a history of defilement. The examination revealed that the complainant had lacerations and swelling on her vagina and her hymen was not intact. On 1st May 2019, PW5 filled out the P3 form and PRC forms which he produced in evidence.

10. The investigation officer, Corporal Benson Obuya (PW6) was attached to Lamu Police Station where the complainant accompanied by her mother reported the incident on 30th April 2019 at about 19:20 hours. After recording statements from the complainant and witnesses, PW6 issued a P3 form which was filled at King Fahd Hospital. He visited the scene and established that the suspect, the appellant referred by the name, Ali Abdalla Mohamed alias Mjomba Abdalla, was a neighbour to the complainant and arrested him on the same day. He obtained the complainant's birth certificate indicating the 4th March 2011 as her date of birth. He produced the birth certificate as an exhibit.

11. In his sworn defence, the appellant stated that on 20th (30th?) April 2019, he went home at 4.00 p.m., and waited for food; that his brother Hassan brought the food at 5.00 p.m.; that his brother informed him that a neighbour had said that he (appellant) "had touched their child" and that the child had been taken to hospital and the matter reported to the police; that he told his brother Hassan that no children

had gone to his house; that Hassan suggested to him to go into hiding which he declined as he had done nothing; that members of the public came and surrounded his house and later the chief and police came and arrested him; that he was detained at the police station for four days before being charged in court. Under cross examination, he stated that on 28th April 2019, children, including Hassan's child, had taken him food and gave them Kshs. 10.00 but that on 30th April 2019 no child took him food.

12. Ahmed Swaleh Hassan Badhawi, DW2, was with the appellant when he was arrested on a date he could not recall. He stated that Hassan brought him food on that day; and that at 6.00 p.m., Hassan came back and told the appellant that police officers were looking for him; that he then took the appellant to his father's place where he stayed with the appellant until the police arrived. That police were forced to shoot in the air as people wanted to attack the appellant.

13. In a judgement delivered on 7th November 2019, the learned trial magistrate found that all ingredients of the offence were established to the required standard; that penetration was proved by the evidence of PW1's as corroborated by the medical evidence; that the age of the victim was established through the birth certificate which indicated the date of birth as 4th March 2011; and that the appellant, being a neighbour was positively identified by recognition by PW1. The trial court observed that PW1's evidence was clear and cogent and was not shaken during cross examination.

14. As already stated, the appellant appealed to the High Court.

    The grounds of appeal were that the evidence of a single identifying witness was unsafe to warrant a conviction; that the sentence was excessive; and that his defence was not considered. Affirming the conviction and sentence, the High Court in concurring with the trial court found that all ingredients of the offence were proved beyond reasonable doubt.

15. In the present second appeal, the appellant in his supplementary grounds of appeal complains that the courts below erred in failing to find that: he was not placed at the scene of crime; the prosecution case was marred with several material discrepancies and the evidence did not connect him to the offence; and that his mitigation was disregarded.

16. During the hearing of the appeal before us on 26th July 2023, the appellant appeared in person virtually from Shimo La Tewa Prison while learned Principal Prosecution Counsel Miss. Keya appeared for the Respondent.

17. The appellant relied entirely on his written submissions in which he urged that the victim did not mention the date of the incident and yet the charge sheet stated that it occurred on 30th April 2019; that the evidence showed that food was delivered to him on 28th April 2019 and not on 30th April 2019 and to that extent the charge sheet was defective.

18. The appellant submitted further that the courts below erred in dismissing his defence despite having explained how he spent the day of the alleged offence; that the trial court erroneously found the victim to be truthful and yet presented no evidence about the occurrences on the day of the incident. He submitted that the evidence against him was fabricated in collusion with his brother Hassan so that his brother could retain the family property.

19. He concluded by urging that the sentence is harsh considering his advanced age of 62 years and prayed for reduction of the term and for his pre-trial detention period to be considered in computing his sentence.

20. In her written submissions in opposition to the appeal dated 22nd May 2023, Miss. Keya submitted that the prosecution tendered evidence that met the required threshold of proof and that all ingredients of the offence of defilement were proved; that penetration was proven through the evidence of PW1,

which though not requiring corroboration by dint of Section 124 of the *Evidence Act*, was indeed corroborated by the medical evidence; that PW1's age was established through her birth certificate which was produced; and that the appellant was a neighbour who was well known to the victim and was positively identified by recognition. Cited was the case of *Francis Muchiri Joseph vs. Republic* [2014] eKLR. It was submitted that the appellant's defence did not shake the prosecution evidence against him.

21. As regards the sentence, counsel submitted that life imprisonment is the prescribed punishment under Section 8(1) as read with 8(2) of the *Sexual Offences Act* but that the trial court in its discretion imposed a lenient sentence on the appellant and this Court has no basis for interfering with it.

22. As already stated, this is a second appeal. By reason of Section 361 of the *Criminal Procedure Code*, our mandate is restricted to considering matters of law. As stated by the Court in *Karani vs. Republic* [2010] 1 KLR 73:

> "This is a second appeal. 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."

23. With that in mind, the issues that arise are whether the trial court and the High Court erred in concluding that the prosecution had established the ingredients of the offence of defilement to the required standard; whether there are material inconsistencies in the prosecution evidence; and whether this Court has a basis for interfering with the sentence meted out by the trial court and upheld by the High Court.

24. Regarding the question of whether the courts below erred in concluding that the prosecution had established the ingredients of the offence of defilement to the required standard it is the appellant's case that there was inconsistency in the victim evidence on the date of occurrence of the incident. It was his case that the charge sheet was defective because the incident occurred on 28th and not 30th April 2019. The respondent on its part maintained that all ingredients of the offence were proved to the required standard and that the appellant's defence did not dislodge the evidence against him.

25. In addressing this question, we bear in mind that there are concurrent findings by the trial court and the 1st appellate court regarding the date of the incident as well as the fact that the ingredients of the offence were proved. In *Mwashanga Mwadingo vs. Republi*c [2018] eKLR, the Court expressed as follows:

> "We appreciate that this Court cannot interfere in the findings of fact by the two courts below unless it is apparent that on the evidence presented and accepted by the trial court, no reasonable tribunal could have reached that conclusion. Additionally, the Court has loyalty to accept the concurrent findings of fact of the two courts below provided they are based on clear evidence which was adduced at the trial. See Bernard Mutua Matheka vs Republic (Criminal Appeal No. 155 of 2009 unreported). We remind ourselves further, as expressed in a litany of our decisions that we must as much as possible defer to the concurrent findings

of fact by the two courts below. In Boniface Kamande & 2 Others vs R [2010] eKLR, this Court pronounced itself as follows:-

> " On a second appeal to the Court, ... we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it.""

26. With that in mind, the date of the offence as indicated in the charge sheet is 30th April 2019. Although PW1 and PW2 did not in their testimony give the date of the incident, the complainant's mother, PW3, stated that the incident took place on 30th April 2019. PW4, Halima Baya, also recalled in her evidence in chief that it was on 30th April 2019 when the incident took place though under cross examination, she mentioned 28th April but later in re-examination stated that she could not "remember properly the date." The clinical officer PW5 and the Investigating Officer, PW6, were consistent in their evidence regarding the date of incident. Based on their testimony, the complainant was treated at the hospital on the day the incident occurred on 30th April 2019 and the treatment notes taken at King Fadh Hospital which were produced bear the date of 30th April 2019. The report at the police station was made on the same day and the appellant arrested on the same day. What the appellant contested was the date when food was delivered to him by the children insisting it was on 28th April 2019 and that on 30th April 2019, it was his brother Hassan who delivered food to him. The finding that the incident occurred on 30th April 2019 is well supported by the evidence.

27. There are also concurrent findings by the trial court and the first appellate court that the ingredients of the offence were proved to the required standard. The trial court was impressed by the evidence of the victim, PW1, which it found to be concise and cogent and unshaken and persuasive. In *Joseph Kariuki Ndungu & another vs. Republic* [2010] eKLR it was stated that:

> " ...the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law."

28. Both courts below found as a fact that the incident occurred on 30th April 2019; that penetration was established through the evidence of PW1 as supported by the medical evidence of PW5; that the birth certificate produced in respect of the complainant established the age of the victim; and that the appellant was positively identified as a neighbour and a person well known by the complainant. In our view, both courts properly directed themselves on the evidence and the law and we have no basis for interfering with their findings.

29. As regards the sentence, the appellant's case is that he is of advanced age and the sentence ought to be reduced. The respondent on its part, while appreciating Section 8(2) of the *Sexual Offences Act* urged that 30 years is lenient by all standards.

30. The record shows that trial court considered the mitigation by the trial court including the fact that the appellant "is a fairly old man" before imposing what the trial court considered to be "a sentence commensurate to the offence committed". Despite the statutory prescription of a life sentence, the trial court imposed as sentence of 30 years imprisonment. Moreover, under Section 361(1)(a) of the *Criminal Procedure Code*, severity of sentence is a matter of fact, outside our remit. That said, we direct,

in accordance with Section 333(2) of the *Criminal Procedure Code* that the appellant's 30-year sentence shall take into account the period the appellant was in custody upon his arrest on 30th April 2019.

31. The appeal otherwise fails and is hereby dismissed.

32. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRARR