Kazungu v Republic (Criminal Appeal 46 of 2021)
[2024] KECA 224 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 224 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 46 OF 2021

S OLE KANTAI, KI LAIBUTA & GV ODUNGA, JJA

MARCH 8, 2024

BETWEEN

ALI KAZUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the High Court of Kenya at Garsen (Nyakundi, J.) dated 18th day of March, 2021 in HC. CR.A. No. 53 of 2018)

JUDGMENT

1. The appellant, Ali Kazungu Mwalimu was charged before the Principal Magistrate's Court at Garsen with the offence of defilement contrary to Section 8(1) and (4) of the *Sexual Offences Act* No 3 of 2006, it being alleged that, on diverse dates between 31st December, 2016 and 29th January, 2017 at the place named in the charge sheet he intentionally and unlawfully caused his penis to penetrate into the vagina of BAO, a child aged 16 years. The prosecution called 5 witnesses in support of its case. The appellant gave a sworn statement denying the charge, after consideration of the evidence adduced by the prosecution and the defence, the trial court convicted him and sentenced him to serve 15 years' imprisonment. A first appeal to the High Court of Kenya at Garsen failed and was dismissed by Nyakundi, J. in a judgment delivered on 18th March, 2021. This is therefore a second appeal from those findings, and our mandate is limited by Section 361 (1) (a) of the *Criminal Procedure Code* to consideration of matters of law only. Accordingly, we must resist the temptation to consider the facts of the case, which were considered by the trial Court and re-evaluated on first appeal, unless we find that the conclusions reached were not supported by the evidence, or could not be reached by a reasonable

tribunal or are perverse, – *Stephen M'Irungi & another v Republic* [1982-88] 1 KAR 360 where it was held on that mandate:

> " Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

2. What was the case before the trial Court on which the appellant was convicted and his appeal dismissed? It was that BAO (PW1), a girl aged 16 years having been born on 21st May, 2000 testified that she knew the appellant, who asked her to be his girlfriend, and she accepted his request. On various occasions in December, 2016 and January, 2017 she would escape from home and go to the appellant's house where they would engage in sexual activity. Her mother NAO (PW2), who confirmed her age, testified to the fact of those escapades by her daughter and narrated a particular incident in the evening of 29th January, 2017 when BAO escaped from home and returned late at night when she (BAO) gained access into the house by breaking a window. She (the mother) came to learn that her daughter would spend the day hiding in the bush, but would spend the nights at the appellant's house. All this was confirmed by LOO (PW4) – the victim's father – who testified that upon questioning BAO where she had spent nights, the girl had admitted that she was spending those nights at the appellant's house where they would have sex. When he (LOO) confronted the appellant asking why he was having sex with his underage daughter, the appellant at first denied the allegation but later asked for forgiveness. LOO reported the matter at Garsen Police Station leading to the arrest of the appellant at his house, which was pointed out to the police by the girl (BAO).

3. It is Police Constable Samuel Ochieng of the said police station who received the report and upon questioning BAO, she admitted to having sex on various occasions with the appellant. The police officer produced in evidence BAO's birth certificate.

4. Buya Said Charo, a Clinical Officer at Garsen Health Centre, examined BAO and found the hymen missing. He produced treatment notes and a P3 Form as evidence.

5. In a sworn statement given in his defence, the appellant narrated how he was arrested and taken to Court on a charge he knew nothing about.

6. As we have seen, the appellant was convicted and his first appeal dismissed.

7. In his homemade "Memorandum Grounds of Appeal" 5 grounds of appeal are set out. The appellant says that the learned Judge on first appeal erred in law in upholding his conviction and failing to consider that the appellant had established a defence under Section 8(5) (b) of the *Sexual Offences Act*; that the High Court erred in law by upholding his conviction when no certified copy of birth certificate had been produced; that the case had not been proved to the required standard; that there were contradictions in the case which the Judge did not consider; and that, finally, that Section 163(4) of the *Evidence Act* was not considered.

8. When the appeal came up for hearing before us on a virtual platform on 23rd October, 2023 the appellant appeared in person from Malindi Prison while learned State Counsel Miss Nyawinda appeared for the office of Director of Public Prosecutions. Both sides had filed written submissions, which they fully relied on.

9. The appellant's submissions begin with "Ammended (sic) Memorandum Grounds of Appeal" where 3 grounds of appeal are set out. We were not told whether these replaced the earlier grounds. The appellant states that the Judge erred in law by upholding his conviction without considering that the burden of proof had been shifted in contravention of Section 110 and 111 of the *Evidence Act*; that the Judge erred in law in failing to appreciate that the trial Magistrate's judgment contravened Section 124 of the *Evidence Act* and that the Judge had not considered the provisions of Section 211 of the *Criminal Procedure Code*.

10. On the alleged violation of Sections 110 and 111 of the *Evidence Act*, the appellant cites the case of *Daniel Maina Wambugu v Republic* [2018] eKLR on the ingredients necessary to prove a case of defilement, and submits that identification through the evidence of a single witness (BAO) was insufficient to prove identification. On the issue of penetration, the appellant contended that this was not proved as the Clinical Officer testified that there were no bruises or tears on BAO's vagina.

11. The appellant faults the lower courts for relying on a copy of the birth certificate where original was not produced before the trial court.

12. On the alleged violation of Section 124 of the *Evidence Act*, the appellant submits that the missing hymen could have been caused by other factors, such as "... riding bicycle, doing jobs or inserting fingers..." and that her hymen was not torn as a result of penetration.

13. The appellant concludes his submissions by stating that his defence was not considered.

14. The respondent, in the written submissions, states that the offence of defilement was proved to the required standard because BAO's age was proved through her own evidence and that of her mother. On penetration, it is submitted that this was proved through BAO's evidence and corroborated by medical evidence, counsel cited the case of *Bassita v Uganda* S.C. Criminal Appeal No 35 of 1995 for the proposition that:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

It is submitted on the issue of identification that BAO testified that she knew the appellant, who came from the village where she lived.

15. On the issue raised by the appellant on the provisions of Section 8(5) (b) of the *Sexual Offences Act*, which provides a defence to an accused person who reasonably believes that the child was over the age of 18 years, it is submitted by the respondent that the issue was not raised at all before the trial court or the High Court on the first appeal.

16. As earlier observed this is a second appeal, and our mandate is limited to consideration of issues of law only.

17. Section 8(5) (b) of the said Act provides a defence to an accused person who reasonably believes that the child victim was over 18 years of age when the offence was committed. We have gone through the whole record. The appellant did not raise that issue at all during the trial. If he had, it would have given the trial Magistrate an opportunity to examine it, consider it and make a finding thereon. Without it

being raised at the trial, the opportunity was lost. The appellant did not at any time reasonably believe that BAO was aged over 18 years. That ground of appeal fails and is hereby dismissed.

18. The appellant also states that the High Court on first appeal erred by relying on a copy of birth certificate when the original was not produced. The record shows that PC Samuel Ochieng of Garsen Police Station, in evidence before the trial court, explained that the original birth certificate had been handed to the school where BAO was to sit for K.C.P.E. The trial court was asked to allow the use of a copy thereof, and there was no objection by the appellant, the application to submit a copy of the certificate was allowed. We find that a reasonable explanation was given why the prosecution did not have the original birth certificate, and that there was no error of law when the court allowed production of a copy thereof.

19. The appellant submits that the burden of proof was shifted. We have gone through the record which shows that BAO testified on how she was approached by the appellant and requested to be his girlfriend, a request which she acceded to, and that what followed were sexual liaisons between the two until it was discovered by BAO's father and mother. This had gone on for a while, and BAO testified that every time she would visit the appellant's house, they would have sex several times. Her mother and father testified on how BAO would escape from home and spend nights out. The Clinical Officer, on examining her, found a missing hymen. There were no tears, and the only explanation for the absence of tears was that sexual intercourse had taken place for a long period of time. There was no shifting of burden at all.

20. On the alleged violation of Section 211 of the *Criminal Procedure Code*, the record shows that, after close of the prosecution case, the State Counsel asked for time and was allowed to file submissions. When asked whether he would make submissions, the appellant on 5th December, 2017, stated:

> Accused
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> Since the matter is old I have elected to leave it to the court." The trial was then adjourned to 7th December, 2017 for ruling where the trial Magistrate held that he had carefully considered all the evidence in the case and found that a prima facie case had been made out to warrant the appellant being put on his defence:
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> > "... Section 211 of the Criminal Procedure Code be explained to the accused in Kiswahili ..."

21. When that was done, the appellant chose to give a sworn statement and stated that he would not call any witness. He was then sworn and gave his sworn statement in defence. We cannot, in those circumstances, see any violation of the procedure set out in the said Section 211, and that ground of appeal also fails and is hereby dismissed.

22. We have considered the whole record, the grounds of appeal raised and find no merit in any of the grounds of appeal. The appeal has no merit and is hereby dismissed.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH, 2024

S. ole KANTAI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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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 REGISTRAR