Kadzena v Republic (Criminal Appeal 121 of 2022)
[2024] KECA 574 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 574 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 121 OF 2022

S OLE KANTAI, KI LAIBUTA & GV ODUNGA, JJA

MAY 24, 2024

BETWEEN

ZUMA MWERO KADZENA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (W. A. Okwany, J.) dated 4th April, 2017 in H.C. Criminal Appeal No. 202 of 2017)

JUDGMENT

1. This is a second appeal from the conviction and sentence of the appellant, Zuma Mwero Kadzena, by the Principal Magistrate Court, Kwale, on an offence of defilement of a girl contrary to section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. It had been alleged in the charge sheet that on diverse dates in the year 2011 and January 7, 2015 at the place named in the charge sheet the appellant had unlawfully and intentionally committed an act which caused his penis to penetrate into the vagina of FMC (PW2), a girl aged 14 years. There was an alternative charge of indecent act with a child contrary to section 11(1) of the said *Act*, it being alleged that, on the same day, at the same place, he committed an indecent act to PW2, a girl aged 14 years by touching her private parts, namely the vagina. He was tried, convicted and sentenced to 20 years' imprisonment after which his first appeal to the High Court of Kenya at Mombasa was dismissed by Okwany, J. in a judgment delivered on April 8, 2019. This is therefore a second appeal and our mandate is circumscribed by section 361(1)(a) of the *Criminal Procedure Code*, which limits our jurisdiction to consideration of matters of law only. We are to avoid the temptation of considering matters of fact which have been considered by the trial court

and re-evaluated on first appeal – see this Court's holding in the case of *Stephen M'Irungi & Another v Republic* [1982-88] 1 KAR 360 where it was observed:

> " 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. We briefly visit the facts of the case to appreciate what was the case before the trial court as reconsidered by the High Court on first appeal.

3. PW2 testified that she was taken in with her younger brother by the appellant when she was 9 years old to live with him. She lived with him in his house and they had sexual intercourse every night, which led to pregnancy; that, at the time of the trial, she was 14 years old and a mother of a 9-month-old child; that, when she got pregnant, she confided to her teacher and mother, and was taken to Msambweni hospital where the pregnancy was confirmed; and that she continued living with the appellant, but that he kicked her out after she gave birth.

4. JAO (PW1) knew both the appellant and PW2, and he testified that the two lived together in the appellant's house. He later learnt that the appellant had impregnated PW2.

5. PC Erick Kimathi of Msambweni Police Station received a report from a Children's Officer on January 26, 2016 to the effect that there was a young girl married to the appellant. He proceeded to the appellant's house and found him under arrest by members of the public. He re-arrested the appellant, took him for DNA assessment and charged him accordingly.

6. At the close of the prosecution case, the appellant was put on his defence and, in an unsworn statement, he stated that PW2 was a friend to his children and stayed with him at his home; that she would stay out at night and joined school while staying with him; and that she escaped from his home for 6 months, and he learnt that she was staying with a young man who was well connected with authorities in the area. According to him, he was arrested for an offence he knew nothing about.

7. As we have seen, the appellant was convicted after the trial.

   There are 5 grounds of appeal in the homemade grounds of appeal. The appellant says that the offence of defilement was not proved to the required standard because the DNA test was not produced as an exhibit in the case; that the High Court erred in law in supporting the conviction when no medical evidence was tendered; that the age of the complainant was not proved; that the High Court erred in law in not finding that some witnesses were not called by the prosecution; and, finally, that his defence was not considered.

8. When the appeal came up for hearing before us on a virtual platform on October 24, 2023 the appellant appeared in person from Shimo La Tewa Prison while learned counsel Miss Freliaka appeared for Office of Director of Public Prosecutions. Both sides had filed written submissions which they fully relied on without the need for a highlight.

9. The appellant in written submission says that witnesses such as the Doctor and Investigating Officer were not called; that he was deprived of the right to representation by a lawyer; and that he was handed a harsh and excessive sentence.

10. In opposing the appeal, the respondent concedes that some witnesses, such as the Doctor who examined PW2 and the Government Pathologist who conducted DNA test, were not called as witnesses. It is submitted that PW2 identified the appellant as the person who had defiled her after taking her into his house after promises that he would educate her and then defiled her until she became pregnant; that her age was proved through production of an age assessment report, and that penetration was proved because the appellant and PW2 lived in the same house for a long time. The respondent further submits that the appellant's defence was considered and disproved and on reliance on the evidence of a single witness. It is also submitted that the trial magistrate gave reasons why he believed the evidence of PW2 to be truthful. It is finally submitted that the sentence meted out was lawful.

11. We have considered the whole record and submissions made.

13. As already noted, this is a second appeal and we are to consider only issues of law if we find that there are such issues raised in this appeal.

14. The appellant complains that he was convicted in the absence of medical evidence and without production of DNA results after DNA had been conducted.

15. This Court considered the issue of lack of medical evidence in the case of *Kassim Ali v Republic* [2006] eKLR and held:

> " The correct legal position is stated in the case of *Chila v Republic* [1967] EA 722 at page 723 para C:
>
> "The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice.
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> Moreover, as the superior court correctly held, the commission of a sexual offence can be properly corroborated by circumstantial evidence (see *Ongweya v Republic* [1964] EA 129).
>
> So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

16. In considering the absence of production of DNA results in a defilement case, this is what this Court stated in the case of *Aml v Republic* [2012] eKLR:

> " The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

17. So, there is no merit in the complaint regarding non- production of a DNA report or the absence of medical evidence. The complaint that her age was not proved has no merit as PW2 testified on her age, and an age assessment report was produced before the trial court. The evidence led was to the effect that the appellant took in PW2 when she was 9 years old on the pretext that he was to educate her. He took advantage of his position as a guardian and repeatedly defiled her making her pregnant when she was 14 years old. PW1 confirmed that the appellant and PW2, who were his neighbours, lived together in the same house for several years.

18. It is true that some witnesses, like the doctor who examined PW2 were not called. The prosecution in a criminal trial should call witnesses to prove its case and should not withhold readily available witnesses as was held by this Court in *Suleiman Otieno Aziz v Republic* [2017] eKLR:

> "Secondly, as propounded in *Bukenya v Uganda* [1972] EA 549, the proposition that the court may draw an adverse inference from the prosecution's failure to call important and readily available witnesses arises in cases where the evidence called by the prosecution is barely adequate. In *Donald Majiwa Achilwa & 2 Others v Republic*, Cr. App. No 34 of 2006, this Court explained the position thus:
>
> 'The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case.'"

19. The record shows that the prosecution applied for adjournment to call more witnesses, but the trial court declined the application forcing the prosecution to close its case. There was evidence by PW2, who testified how she lived with the appellant, who repeatedly defiled her leading to pregnancy. By the time she testified before the trial court, she was a 14-year-old mother of a 9- month old child. The fact of the appellant and PW2 living together in his house was proved as per the testimony of PW1. Although witnesses, such as the doctor who had examined PW2 were not called and the case was closed, the evidence before the trial court was sufficient to prove the charge of defilement that the appellant faced.

20. We have perused the record and found that the trial court considered the appellant's defence and found it displaced by the cogent evidence given by the prosecution witnesses.

21. The sentence of 20 years' imprisonment handed down was within the law as prescribed by the *Sexual Offences Act*.

22. We have considered all the grounds of appeal and we find no merit in any of them. This appeal has no merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT MOMBASA THIS 24TH MAY, 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

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR