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JKK v Republic (Criminal Appeal 17 of 2016)
[2024] KECA 756 (KLR) (21 June 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 17 OF 2016

F SICHALE, FA OCHIENG & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

JKK .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Naivasha (Hon. C. Meoli, J.) delivered and dated 13th February, 2016 in HCCRA No. 93 of 2015)

JUDGMENT

1. JKK, the appellant, is before us on second appeal. His first encounter with the courts in respect to this appeal was when he was charged before the Narok Chief Magistrate's Court in Criminal Case No. 1036 of 2012. Therein, the appellant was in the 1st count charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars of the charge being that on 2nd August 2012 in the defunct Narok South District within the then Rift Valley Province, the appellant caused his penis to penetrate the anus of HK, a child aged two years. The appellant was in the alternative charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars being that at the place and date stated in the main count, the appellant touched HK's anus with his penis.

2. The appellant was also faced with a second count of being in possession of cannabis sativa contrary to section 3(1) as read with section 3(2) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*. The particulars of the charge stated that on 14th August 2012 at Mulot Police Station in the defunct Narok South District within the then Rift Valley Province, the appellant was found in possession of one roll of cannabis sativa with a street value of KSh. 30/=.

3. The appellant pleaded guilty to the 2nd count and was sentenced to 3 years in prison. The trial ensued on the 1st count and the alternative charge and at the conclusion of the trial the appellant was found guilty

of the main charge and sentenced to life imprisonment. Dissatisfied with the decision, the appellant appealed to the High Court raising 4 grounds of appeal. Meoli, J. in a judgment dated 13th February 2016 dismissed the appeal in its entirety. That judgment is the subject of this appeal.

4. The appellant focused his submissions on his supplementary grounds of appeal, through which he faults the judgment of the first appellate Court on the grounds that the sentence was illegal as it was passed in its mandatory nature; that he was not accorded adequate time and resources to prepare his defence as he was not issued with witness statements; and that his defence of intoxication was not taken into consideration.

5. Before the trial Court, the prosecution called four witnesses.

PW1, LKC, was the grandmother to the victim. Her evidence was that on the material day at about 10.00 am she was called by her sister who informed her that the complainant was sick. She rushed home and found the complainant's mother holding him. She noticed the complainant was looking pale and could not stand. Upon examining the complainant, she noticed that his anus was badly wounded. She took the complainant to Longisa Hospital and on returning from the hospital, the complainant's mother took off. The complainant's mother was later arrested and her arrest prompted the appellant to come forward. He confessed to having committed the offence. She further testified that she knew that the complainant was born on 10th August 2010 because she midwifed his birth. PW1 testified that a P3 form was filled for the complainant.

6. Chief Inspector of Police Ronald Kibet testified as PW2 stating that on 5th June 2012 the appellant was taken to his office at the Mulot D.O.'s office by people who alleged that he had defiled a minor. He arrested the appellant and took him to Mulot Police Station where upon being searched a roll of bhang was recovered from the left pocket of his jacket.

7. Christine Rono testified as PW3 stating that she filled the complainant's P3 form on 15th August 2012. She examined the complainant and found that his anus was bruised and he also had a discharge. She concluded that the age of the injury was 10 days. She admitted the complainant for 3 days as he underwent treatment. Her opinion was that the complainant had been sodomised and the degree of the injury was grievous harm. According to the witness, the instrument used was a human penis and that the injuries could not have been inflicted by a metallic object.

8. Police Constable Gideon Chulla testified as PW4 stating that he was the investigating officer in the matter. He recalled that PW1 reported the incident on 9th August 2012 at about 8.00 am. He issued a P3 form to her which later was filled at Longisa Hospital. The witness further testified that on 13th August 2012 the appellant was arrested by the public and escorted to Mulot Police Post. Upon searching the appellant, they recovered a roll of bhang from his pocket. He escorted the appellant to Narok Police Station and later had him charged with the stated charges.

9. In his defence, the appellant testified that his wife who was the mother of the complainant was the daughter of PW1. He stated that on the material date, he was left alone with the complainant and since the complainant's mother had eloped with another man, he was overwhelmed by anger. He directed his anger at the complainant thereby causing him the injuries using a candle. He also stated that he had smoked bhang to relieve stress as was his tradition.

10. When this appeal came up for hearing on the Court's virtual platform, the appellant appeared in person while learned counsel Ms. Kisoo appeared for the respondent. Both the appellant and counsel for the respondent had filed their respective submissions which they sought to rely on albeit with brief oral highlights on what they felt were the key issues in the appeal.

11. The appellant's submissions were undated. In brief, he submitted that the sentence of life imprisonment was handed down in its mandatory nature hence the trial Court did not exercise its sentencing discretion, thus violating the Judiciary Sentencing Policy Guidelines, 2016, the provisions of sections 216 and 329 of the Criminal Procedure Code and *the Constitution*. To buttress this point, he relied on the High Court decision in Philip Mueke Maingi & 5 others v. Director of Public Prosecutions & the Attorney General [2022] KEHC 13118 (KLR).

12. Turning to his challenge against conviction, the appellant submitted that he was not provided with witness statements and because he was unrepresented it was the duty of the trial Court to guarantee his rights. He urged that the failure to supply him with witness statements resulted in violation of his right to fair trial which is protected under Article 50 of *the Constitution*. He relied on the High Court decisions in Jacob Mwangama Mwandhigha v. Republic [2017] eKLR and Ann Njogu & 5 others v. Republic [2007] eKLR to urge the Court to quash his conviction on this ground.

13. Still contending that his conviction should be set aside, the appellant argued that the two courts below failed to consider his defence of intoxication and also that the prosecution did not prove penetration. According to the appellant, his testimony that he was intoxicated, having smoked bhang, was never given any consideration. He also argued that the evidence tendered by PW3 fell short of proving the element of penetration. In the end, the appellant urged that his conviction be quashed and the sentence set aside.

14. For the respondent, learned counsel Ms Kisoo relied on the submissions dated 15th November 2023. Counsel conceded the appeal by accepting the appellant's contention that his right to a fair trial was infringed. She stated that the record is clear that the evidence of PW1 and PW2 was taken without the appellant being supplied with witness statements. It was therefore counsel's submission that the trial offended Article 50(2)(j) of *the Constitution*. To buttress this submission, counsel relied on the cases of Anthony Mutuku Mutua v. Republic [2020] eKLR and Simon Githaka Malombe v. Republic [2015] eKLR.

    Counsel, nevertheless, submitted that the evidence against the appellant was overwhelming and relied on the case of Samuel Wahini Ngugi v. Republic [2012] eKLR in urging us to remit the matter to the magistrate's court for retrial.

15. This being a second appeal, we are by dint of section 361 (1)

    a. of the Criminal Procedure Code required to only consider issues of law. Where the two courts below have made concurrent findings of fact, we must respect those findings unless we are satisfied that the conclusions are not supported by the evidence or are based on a perversion of the evidence. This well- established principle has been articulated by the Court in numerous decisions, including Adan Muraguri Mungara v. Republic [2010] eKLR, where the Court was empathic that:

        > " Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 Criminal Procedure Code). As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

16. We have considered the record of appeal and the submissions by the appellant and the respondent. In our view, the issues for determination are whether the appellant was accorded a fair trial; whether the prosecution proved the offence of defilement against the appellant; whether the appellant's defence was considered; and whether the appellant has made out a case for our interference with the sentence.

17. We will address the first and second issues together. The appellant contends that he was not accorded a fair trial as he was not issued with witness statements. It is a truism that an accused person's right to fair trial under Article 50(2) of *the Constitution* includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. In Isaak Anjelimo Makana v. Republic, Criminal Appeal No. 57 of 2017 (Court of Appeal at Nakuru judgment dated 2nd February 2024), the Court spoke to this right as follows:

> "Pursuant to the foregoing, we wish to reiterate that the objective of the prosecution furnishing statements of witnesses and documents to the accused person before the commencement of a trial is to enable the accused person know in advance the nature of the case against him and also to help him or her to prepare an appropriate defence. The duty to furnish such evidence lies with the prosecution as opposed to the court which is mandated to guarantee the enjoyment of this right by the accused person."

18. The respondent in conceding to the appeal on this ground referred to the case of Simon Githaka Malombe v. Republic [2015] eKLR. In the cited case, the Court in allowing the appeal held that:

> "It is the prosecution that assembles and retains custody of evidence against an accused person. The duty of disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the Office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the State, which the prosecutor represents, to avail the copies at State expense. It is for that Office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in Article 50(2)(c)and (j) be real.
>
> The denial of witness statements in the present case reduced the trial to a farcical sham. The appellant, finding himself incapacitated without the witness statements, elected not to cross-examine any of the witnesses. In doing so he was making a dignified protest against a process so unfairly weighed and tilted against him as to be wholly unacceptable. The result was that all of the evidence on record lacked the searching test of cross-examination..."
>
> (Emphasis ours)

19. In the appeal before us, the first appellate Court tersely addressed the issue of the violation of the appellant's right to a fair trial as follows:

> "Possibly out of deference, he did not cross-examine PW1 the mother to his wife/girlfriend. But he did cross-examine other witnesses, and in particular canvassed part of his defence with PW3. It is too late for the Appellant to raise the issue of statements..."

20. Our own review of the record shows that on 11th October 2012, the appellant requested the trial Court for witness statements and an order was issued to the OCS, Mulot Police Station to supply the appellant with statements at his expense. On 15th October 2012, the appellant once again informed the Court that he was not ready to proceed for he had not been supplied with the witness statements. The Court made an order that the hearing proceeds at 11.30 am and that the appellant be supplied with statements. Later at 11.30 am, the appellant informed the Court that he could not afford to pay for

the statements and would therefore proceed without them. On that day, only PW1 testified and at the conclusion of her testimony the appellant did not cross-examine her. The trial proceeded again on 21st May 2023 when PW2 testified but was stood down before concluding his testimony so that he could bring a certain exhibit to Court. The record further shows that on 17th June 2013 before PW3 testified the appellant was supplied with witness statements. After completing his evidence in chief, PW3 was cross-examined by the appellant.

21. Considering the record, we find the circumstances of this case distinguishable from those in Simon Githaka Malombe (supra).

In the appeal before us, the appellant did not cross-examine PW1 but cross-examined all the other witnesses. Although the record does not indicate that the appellant's failure to cross-examine PW1 was directly linked to his not having access to her statement, the record is clear that the appellant had the statements of PW3 and PW4 prior to their testimony and that of PW2 by the time he was cross-examining him. We have looked at the record as a whole and specifically, the appellant's cross-examination of PW3 and the appellant's own defence. In his defence, the appellant stated as follows:

> "... The complainant is my son. He was left alone with me on the material date and complainant's mother was a prostitute and had eloped with another man. I was bitter and I injured the boy, my son out of anger... I injured his anus using candle. Pardon me since I was angry. He was born on 10/8/2010"

22. In his cross-examination of PW3, the medical expert, the appellant challenged the witness as to the type of the object used to commit the offence. We appreciate that, as was in the case of Simon Githaka Malombe (supra), the appellant may have been incapacitated by the lack of the witness statements resulting in his failure to cross-examine PW1. It is important for this Court to point out that both the prosecution and the trial Court did not live up to their respective responsibilities. The prosecution was under a duty to supply the trial documents to the appellant at the State's expense. Likewise, the trial magistrate was obligated to ensure this had been done before commencing the trial. However, we do not find their missteps to have been fatal to the prosecution's case against the appellant. Even though the evidence of PW1 was not subjected to cross-examination, and may thus have been of no probative value, there was sufficient evidence from the other witnesses that linked the appellant to the commission of the offence. For example, the question of the appellant's identity was not contested and the appellant himself conceded both in his testimony and before PW4 that the complainant was his son. The element of penetration was proved by PW3. In his defence the appellant conceded to penetration only stating that he used a candle as opposed to his penis. The third element of defilement being the complainant's age was attested to by PW3 and was confirmed by the appellant who told the trial Court that his son was born on 10th August 2010. In light of the foregoing, and after excluding the evidence of PW1, the prosecution's case remains solid in proving that the appellant is the person who defiled the minor.

23. That a misstep in a trial does not necessarily lead to the collapse of the prosecution case was confirmed by the Court in Maripett Loonkomok v. Republic [2016] eKLR where it was stated that:

> "On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voir dire examination. The complainant's evidence was congent; she was cross-examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the

prosecution and defence evidence, especially the medical evidence which corroborated the fact of defilement."

(Emphasis ours)

24. In the circumstances of this case, we find that although the appellant's right to a fair trial was violated in respect to the recording of the evidence of PW1, the remaining evidence against him was sufficient to result in a conviction. With utmost respect to the respondent's counsel, we find no merit in her concession to the appeal against conviction. Having found that the appellant's conviction was proper, there is no reason for us to explore the respondent's submission that this is a matter deserving of an order for retrial.

25. With regard to the third issue being the claim by the appellant that his defence of intoxication was not considered, we concur with the first appellate Court's finding that the appellant formed an intention free from intoxication and was driven by anger and the desire to punish his estranged wife. Under the provisions of section 13(2) of the Penal Code, Cap. 63, the defence of intoxication was only available to the appellant if he had demonstrated that the intoxication was involuntary and had prevented him from forming the intent to commit the crime, or that the intoxication had rendered him insane, temporarily or otherwise. The appellant in his own defence admitted that although he smoked "bhang" to relieve stress, he was not doing it under the prescription of a doctor. The intoxication, if true, was therefore self-inflicted and thus voluntary. The appellant did not allude to the other line of defence arising out of intoxication-that the "bhang" had made him insane. Even if he had pursued that line of defence, the onus would still have been on him to prove that he was not sober at the time of the commission of the offence. This, he did not do. In the circumstances of this case, we find that the defence of intoxication was not established by the appellant and the Judge of the first appellate Court rightly rejected the defence.

26. Flowing from the foregoing analysis, we find no substance in the appeal against conviction. We accordingly dismiss it.

27. Finally, we turn to the appeal against sentence. We have reviewed the sentencing proceedings, and note that the trial Court passed the sentence of imprisonment for life in its mandatory nature by observing that the sentence was what was provided by the law. This appeal was heard at a time when there has been a jurisprudential shift on mandatory statutory sentences. The appellant is therefore entitled to benefit from this development of the law.

28. In sentencing the appellant, we are to consider both the mitigating and aggravating circumstances. The aggravating factors are that the victim was a 2-year old toddler. Children would ordinarily expect to have security and safety from their fathers, but that was not the case for the victim. The appellant turned against his own son, driven by anger against his wife, and committed heinous acts against him. On the other hand, we note that the appellant expressed his remorse during his defence. Balancing the aggravating and the mitigating factors, we find that a long custodial sentence will give the appellant an opportunity to reflect on his acts, and may be reform. He will therefore serve 40 years' imprisonment.

29. The upshot of the foregoing is that the appeal against conviction is without merit and is dismissed. However, the appeal against the sentence partially succeeds. The sentence of life imprisonment is hereby set aside and substituted with a sentence of 40 years in prison. For avoidance of doubt the prison sentence shall run concurrently with the sentence of 3 years imprisonment that had been meted upon the appellant in respect to count 2. We note from the record that the appellant was remanded throughout his trial. Therefore, in line with the proviso to section 333(2) of the Criminal Procedure Code the concurrent sentences shall run from 16th August 2012 when the appellant was first presented to the trial Court for plea.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024

F. SICHALE

....

JUDGE OF APPEAL

F. OCHIENG

....

JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR