Abdalla v Republic (Criminal Appeal 68 of 2022)
[2024] KECA 634 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KECA 634 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 68 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JUNE 7, 2024

BETWEEN

SALIM ISSA ABDALLA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Garsen (R. Nyakundi, J.) delivered on 18th March 2021inHCCRA No. 8 of 2019)

JUDGMENT

1. This is a second appeal arising from the judgment of the Principal Magistrate's Court at Lamu (Hon. Temba A. Sitati, PM) delivered on 14th June 2019 in Criminal Case No. 1 of 2019 in which the appellant was convicted and sentenced to 20 years imprisonment for defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, 2006 (the Act). The conviction and sentence prompted the appellant's 1st appeal to the High Court of Kenya at Garsen in Criminal Appeal No. 8 of 2019 in which R. Nyakundi, J. delivered the impugned judgment on 18th March 2021 dismissing the appeal and upholding the appellant's conviction and sentence meted by the trial court.

2. The particulars of the charge were that, on 19th January 2019 at around 7:14 am in Lamu West Sub-County, the appellant intentionally and unlawfully caused his genital organs, namely penis to penetrate the genital organs of LB, a girl aged 9 years.

3. On its part, the prosecution called 4 witnesses, including LB, the complainant (PW1), who testified that on the date, time and place aforesaid, she went to draw water from a nearby well; that she had no can with which to draw water; that she went to the appellant's house for help; that when LB asked the appellant for a can with which to draw water, he (the appellant) asked her to get into the house; that, when she went in, the appellant shut the door behind him, covered her mouth with his hands,

pulled her onto his bed, forced her to remove her clothes and lie on the bed; and that the appellant then undressed and forcibly had sex with her.

4. The complainant further testified that, after the appellant had sex with her, he told her not to tell anyone; that he gave her a packet of biscuits, a KShs. 50 note and ordered her to leave; that, when she went out, her sister, F (PW2), saw her and asked her why the appellant's door had been locked; that the complainant revealed to PW2 that the appellant had sex with her by force; that PW2 called out to the appellant to accompany them to the police, and that he obliged; and that, after the police questioned the three of them, they took the complainant to King Fahd Hospital for examination.

5. Confirming the incident, PW2 stated that the complainant had gone ahead of her to the well to draw water; that she got worried when the complainant took too long and followed her; that, when she got to the well, she only saw the complainant's bucket; that she went to a nearby relative's house, but did not find the complainant; that she returned to the well, but did not find her; that, as she turned to leave, she saw the main door to the appellant's house being opened, the appellant peeped out, then went back in, and came out with the complainant behind him; that the complainant was holding a packet of biscuits and a KShs. 50 note, and she suspected that the appellant had defiled her; that she pushed the complainant back into the house, lifted her dress, asked her to part her legs, and saw semen dripping out of her genitalia; that she escorted the complainant to their mother, who saw the semen still dripping from the complainant's genitalia; that their mother led them to the appellant's house and asked him why he defiled the complainant; that the appellant blamed the devil and begged forgiveness; and that they escorted him to the police station.

6. Made Sheyumbe (PW3), a clinical officer at King Fahd Hospital, examined the complainant on 19th January 2019 and found that her hymen was missing; that the approximate age of the injury was six hours; and that the high vaginal swab showed no sperms. He produced a treatment book and a P3 form in evidence at the trial.

7. The investigating officer, Sergeant Hakim Lorem (PW4), confirmed the appellant's arrest and detention in police custody; and the subsequent medical examination of both the complainant and the appellant. According to PW4, he interviewed the appellant, who told him that it was Satan who made him do it and asked for forgiveness.

8. The appellant denied the charge, elected to remain silent and called no witnesses in his defence.

9. In his judgment dated 14th June 2019, Temba A. Sitati (PM), found that the State had proved its case beyond reasonable doubt, and that the appellant was guilty of defilement. He sentenced him to 20 years' imprisonment.

10. Aggrieved by the trial court's decision, the appellant appealed to the High Court of Kenya at Garsen in HC Criminal Appeal No. 8 of 2019 in which R. Nyakundi, J. dismissed the appeal and upheld his conviction and sentence.

11. Dissatisfied with the learned Judge's decision, the appellant moved to this Court on 2nd appeal on 3 grounds set out in his undated "Memorandum and Grounds of Appeal" and on the subsequent undated and untitled memorandum. In summary, the 3 grounds are that the learned Judge erred in law: by upholding the appellant's conviction and in failing to consider that the prosecution did not prove the case to the required standard; by not considering that Section 8(1) and

3. of the Act fetters the court's discretion with regard to sentencing; and by not considering the appellant's defence evidence. He also faulted the trial court and the learned Judge in not considering that his conviction was also based on an alleged confession that was not in compliance with section 25A(1) of the *Evidence Act*.

12. In support of his 2nd appeal, the appellant filed undated written submissions citing 6 judicial authorities, namely: Jacob Odhiambo Omumbo vs. R. [2008] eKLR; and *Rose Ouma Otawa vs. R*. 2011[eKLR, arguing that, when the prosecution does not prove all the ingredients of an offence, it follows that they have not proved the charge against the appellant.

13. In addition to the foregoing, the appellant also cited the cases of Remmy Wanyonyi Wanjoki v R. [2020] eKLR,contending that there were gaps on the doctor's findings, which fell short of connecting the appellant to the offence charged; and Okeno vs. Republic [1972] EA 32, submitting that, this being the 2nd appeal, this Court is guided by the principles of law in re-analysing the same and in arriving at its own independent verdict on matters of law, but always bearing in mind that the trial magistrate had the advantage of observing the demeanor of the witnesses and give allowance therefor. However, we could not establish the authenticity of the 5th and 6th authorities of Mohamed v Republic; and Arthur Mushila Manga v Republic [2016] eKLR, cited for the immutable principle that the prosecution must prove its case beyond reasonable doubt. On the basis of his submissions, the appellant urges us to allow the appeal.

14. Opposing the appeal, the Acting Assistant Director of Public Prosecution, Mr. Jami Yamina, filed written submissions dated 21st July 2023 citing no judicial authorities. Counsel submitted that the appellant's conviction was safe, and that the case did not demonstrate any mitigating circumstances; that the appellant was a Madrassa teacher, a religious instructor, and a man entrusted to offer guidance by the community to its members; and that he took advantage of the minor complainant and turned into a sexual predator. He urged us to dismiss the appeal.

15. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law by dint of section 361 of the *Criminal Procedure Code*. In Karingo v Republic [1982] KLR 213, the Court stated:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

16. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on 2 main issues of law, namely: whether the prosecution had proved the charge against the appellant to the required standard; and whether the trial court failed to consider that the nature of confession evidence alleged by PW2 and PW4 of the offence of defilement was inadmissible under section 25A(1) of the *Evidence Act* (Cap. 80).

17. The question as to whether the trial court exercised its discretion judiciously in imposing the sentence against him is a question of fact to which we cannot address ourselves on 2nd appeal by virtue of section 361(1)(a), which limits this Court's jurisdiction to issues of law only to the exclusion of matters of fact, and severity of sentence is a matter of fact. Likewise, the remaining grounds raise issues of factual evidence, which we cannot re-open or disturb on 2nd appeal to this Court because the circumstances under which the Court may interfere with such findings do not exist in this case.

18. In *Adan Muraguri Mungara v Republic* [2010] eKLR,this Court set out the only circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court in the following terms:

> "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." [Emphasis added]

19. Turning to the 1st issue, we hasten to point out right at the outset that the factual evidence led by the prosecution proved the charge of defilement beyond reasonable doubt. The three 3, ingredients of the offence of defilement, namely: the age of the victim; penetration; and identification of the accused were proved in accordance with section 8(1) and (3) of the Act. It is common ground that the appellant was a well- known neighbour to the complainant and her family; that her age, which was stated as 12 years, was confirmed by her birth certificate produced by PW4; and that penetration was proved by production by PW3 of the treatment book and a duly completed P3 form. The appellant's identity and the evidential documents aforesaid remained uncontested.

20. For the avoidance of doubt, the term "penetration" is defined in section 2 of the Act as "partial or complete insertion of the genital organs of a person into the genital organs of another person." That is precisely what the prosecution witnesses attested to and what the appellant admitted as having done to the complainant, and for which he begged forgiveness by PW2, the complainant's mother and PW4.

21. The decision of the High Court of Kenya at Bomet in *Sigei v Republic* [2022] KEHC 3161 (KLR), quoting the Supreme Court of Uganda in *Bassita v Uganda* S.C. Criminal Appeal Number 35 of 1995, cannot escape our attention. As the High Court correctly observed:

> 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." (Emphasis added)

22. To our mind, the complainant's own evidence as corroborated by the medical evidence, and the circumstantial evidence of PW2 and PW4, including the appellant's admission to them, proved beyond reasonable doubt that the appellant defiled the complainant.

23. Turning to the 2nd issue as to what the appellant's refers to as a confession to PW2 and PW4 was admissible in evidence, we hasten to observe that what the appellant told PW2, PW4 and the complainant's mother, though loosely referred to as a confession by the trial court, cannot strictly speaking be termed as a confession within the meaning of section 25A(1) of the *Evidence Act*. It was an admission, which constitutes supplementary evidence that would, in ordinary circumstances, affirm the safety of a conviction in the absence of any direct or circumstantial evidence. However, that was not the case here. To our mind, there was sufficient direct and circumstantial evidence to convict the appellant with or without the admission in issue. Moreover, the direct and corroborative evidence led by the prosecution in proof of the ingredients of defilement did not require back- up by a confession or admission, as the case may be.

24. The distinction between an admission and a confession was clarified in *Ram v State* CAIR [1959] ALL 518 thus:

> "The acid test which distinguishes a confession from an admission is that where conviction can be based on the statement above, it is a confession and where some supplementary evidence is needed to authorize a conviction, then it is an admission."

25. Simply put, a "Confession" refers to admitting guilt for a crime or wrongdoing, whereas admission refers to revealing information or acknowledging guilt. Typically, confessions are made to authorities or in a legal setting as required under section 25A(1) of the *Evidence Act*, while admissions can take place anywhere as was the case here.

26. In conclusion, we find nothing to suggest that the appellant was convicted on the basis of a "confession" as claimed. The admission of what he had done to the complainant and his plea for forgiveness was merely supplemental to the direct and corroborative evidence on which he was convicted. Accordingly, the only substantive issue of mixed law and fact as to whether the prosecution proved its case on the required standard stands settled.

    Indeed, we find nothing, as did the High Court, to justify interference with the trial court's decision to convict the appellant for the offence of defilement as charged. In effect, the appeal fails and is hereby dismissed.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE, 2024.

A. K. MURGOR

JUDGE OF APPEAL

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DR. K. I. LAIBUTA

JUDGE OF APPEAL

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G. V. ODUNGA

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR