Kinyua v Republic (Criminal Appeal 36 of 2019)
[2024] KECA 1249 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1249 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 36 OF 2019

LK KIMARU, W KARANJA & AO MUCHELULE, JJA

SEPTEMBER 20, 2024

BETWEEN

BENARD MACHARIA KINYUA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kerugoya (L.W Gitari, J.) dated 21st February 2019 in HCCRA No. 46 of 2017)

JUDGMENT

1. Under section 361(1) of the *Criminal Procedure Code*, and on the basis of the authorities of this Court, our mandate on second appeal is limited to the consideration of points of law. We are enjoined to defer to concurrent findings of fact by the two lower courts unless it is shown that they considered matters of fact that they should not have considered or did not consider matters they ought to have considered or that the conclusions they arrived at were plainly wrong. (See *Dzombo Mataza v Republic* [2014]eKLR).

2. The appellant, Bernard Macharia Kinyua, was on 27th June 2017 convicted by the Senior Principal Magistrate at Baricho of defilement contrary to section 8(1) and (4) of the *Sexual Offences Act* and, following mitigation, was sentenced to 15 years in jail. This was the mandatory minimum penalty for the offence. The complainant ANM. (PW 1) was aged 16 at the time of the offence. She was born on 6th August 1999 according to the birth certificate that was produced in evidence.

3. The appellant was dissatisfied with the conviction and sentence and appealed to the High Court at Kerugoya. The court (L.W. Gitari, J.) heard the appeal and, on 21st February 2019, dismissed it in its entirety. This is what led the appellant to come before this Court.

4. In the amended grounds of appeal, the appellant claimed that the two courts below erred in law and fact by failing to find that the elements of defilement were not conclusively proved to warrant a conviction; that the High Court failed to re-analyse and re-evaluate the evidence tendered before the trial court; that PW 1 was not worthy of credit; and that the prosecution case was founded on insurmountable inconsistencies and contradictions to such an extent that there was no proof of guilt beyond reasonable doubt.

5. The sworn evidence of PW 1 was that on 19th June 2016 in the evening her grandmother sent her to go and buy paraffin. She went to the shop and bought the paraffin. On the way back, it was raining. She met the appellant whom she knew as he was a neighbour. He had in the past been seducing her but she was not interested. He grabbed her by the collar of her dress and beat her using fists. She managed to release herself from him but he entangled her and she fell down. He pulled her into the coffee farm and put something on her mouth. She lost consciousness till the following day at 2.00pm. She found herself without her underpants, and was lying on the ground. She had pains in her genitalia. She rose up and while walking home she fainted again. She was rescued and taken home.

6. IWN (PW 2) stated that on 20th June 2016 she found PW 1 at the roadside. She had wet clothes and said she was feeling dizzy. LWM (PW 3) stated that she found PW 1 at the road. She had wet clothes and had challenges in walking. She was helped to get home and was taken to Baricho Police Station where the report was booked before she was taken to Baricho Health Centre. John Ngatia Githaiga (PW 6), a clinical officer, examined her and found she had a foul-smelling discharge, bruises on the perineal area and her hymen was broken.

7. JW (PW 5) was PW 1's mother. She testified that at the time of the incident PW 1 was staying with her grandmother. On 20th June 2016, she was called at about 3.00pm and informed that PW1 had been taken to Baricho Health Center. She rushed there and found PW 1 who told her that she had been defiled by their neighbour. PW 4 (MNW) was the one who, at the instance of the said grandmother, had given PW 1 Kshs.20.00 to go and buy paraffin. PW 1 went away to the shop at 6.00p.m. but by 7.30p.m. she had not returned. Next day, PW 4 returned to the home but PW 1 had not returned. At 2.00pm, the grandmother (who was PW 4's mother-in-law) called to say that PW 1 had been found in a coffee farm. She (PW 4) got a motorcycle and went to the scene and carried PW 1 to police station. She was foaming at the mouth. She told PW 4 that she had been defiled by a neighbour called Macharia. According to PW 3, PW 1 complained to the police when they got there that he had been defiled by Macharia who was a neighbour. According to PW 2, the appellant's home is 3 parcels of land from where PW 1 was staying.

8. The appellant made unsworn statement in defence. He denied that he had defiled PW 1. He stated that he did not know PW 1 or the witnesses who had testified in the case.

9. This is the evidence that the trial court considered, and the High Court reconsidered, to reach the conclusion that PW 1 had been defiled, and by the appellant.

10. We have considered the record, the grounds of appeal, the written submissions by the appellant and the rival submissions by the learned counsel Mr. Naulikha for the State. We have indicated in the foregoing that the birth certificate of PW 1 confirmed that she was 16 years old at the time, and was therefore a child.

11. On the question of whether penetration was proved, the appellant's submission was that there was no proof; that the fact that PW 1 had foul smell in her discharge and that her hymen was missing did not prove penetration. Further that, there was no presence of spermatozoa noted. According to the submissions by learned counsel Mr. Naulikha, PW 1's narration of events that indicated she had been

defiled found support in the medical evidence which indicated that there was injury to her genitalia. We agree with the two courts below that there was overwhelming evidence of penetration. PW 1 found herself without her underpants. She had pain in her genitalia. She had problems walking. She was examined. She had a foul smell emanating from her genitalia, and her perineal area was bruised. It is clear to us that the learned Judge was right in finding that penetration had been proved.

12. As to whether it was the appellant who had penetrated PW 1, the appellant's submission was that, according to PW 1, the incident was at night and that care had not been taken by the learned Judge to confirm that the circumstances for positive identification obtained; that, now that it was at night, there was no evidence regarding what light was used to see and identify the attacker. Reference was made to the decisions in *Abdalla Bin Wendo v R.* [1953]20 EACA 166 and *Okwang Peter - v- Uganda*, Criminal Appeal No. 104 of 1999 in Uganda for the point that, now that the circumstances for positive identification were difficult, what was needed was other evidence to support what PW 1 had stated.

13. The appellant went on to submit that, PW 1's evidence was riddled with contradictions that made it not believable. He referred us to the decisions in *Phillip Nzaka Watu -v- Republic* [2016]eKLR and *John Mutua Musyoki v Republic* [2017]eKLR. In either case, this Court emphasised that where the prosecution case has contradictions and discrepancies that are material and go to the root of the case, then a conviction based on them cannot be said to be safe. According to the State, the appellant's conviction was based on evidence that proved his guilt beyond reasonable doubt.

14. The High Court acknowledged that the evidence of PW 1 as to when the incident had occurred was not consistent. We have reviewed the record. During evidence in chief, PW 1 stated the appellant pulled her to the coffee farm at 6.30 pm. When cross- examined, she at first stated that it was at 6.30pm and later on stated it was at 8.00pm. when re-examined she stated:-

> " I was sent at 6.30pm. I bought kerosene and returned home at 8.00pm..."
>
> From the evidence, the learned Judge concluded that the incident was at 6.30pm and went on to state that at that time –there was sufficient light."

PW 1, we observed, made no reference to there having been light, leave alone sufficient light. At the conclusion of her evidence, it was clear that the incident was at 8.00p.m. That was at night. Now that she did not say there was light, the question was how she was able to identify and/or recognise the appellant at night. It was during her re-examination that she stated:-

> " I used to know him before and I also recognised by his voice."
>
> However, throughout the testimony of PW 1 there was nowhere that she stated that the attacker talked to her. She did not say what it was that the appellant said during the incident that made her recognise his voice.

15. PW 1 and the appellant may have been neighbours, who know each other well. But we find that PW 1's evidence that the appellant was the one who attacked her and defiled her during this night was not a safe basis to convict him on the charge. The result is that the appeal against conviction is allowed. The conviction is quashed and the sentence set aside.

The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR