Njiru v Republic (Criminal Appeal 107 of 2017)
[2024] KECA 1270 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1270 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 107 OF 2017

M NGUGI, FA OCHIENG & WK KORIR, JJA

SEPTEMBER 20, 2024

BETWEEN

FRANCIS KARIMI NJIRU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nyahururu (R.P.V Wendoh J.) dated 22nd September, 2017. in Nyahururu HCCR No. 54 of 2017)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* before the Senior Principal Magistrate's Court at Nyahururu in Criminal Case No.1308 of 2014. The particulars of the offence were that on 17th May 2014 at Nyandarua County, he intentionally caused his penis to penetrate the vagina of ANM, a child aged 6 years. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of this charge were that on the same date and place as in the main count, he intentionally and unlawfully caused his penis to come into contact with the vagina of ANM, a child aged 6 years. He was convicted on the main count of defilement and sentenced to life imprisonment as prescribed under section 8(2) of the *Sexual Offences Act*.

2. Dissatisfied with both his conviction and sentence, the appellant lodged Criminal Appeal No. 54 of 2017 before the High Court in Nyahururu. He contended before the High Court that the trial court had allowed the matter to proceed without him being supplied with all the evidence that the prosecution intended to rely on; that no DNA test was conducted on him to confirm that he caused the genital wound on the complainant; that he had worked for the complainant's family for 6 months without pay and that they fabricated the case against him to avoid paying him.

3. Upon hearing his appeal, the court (R.P.V. Wendoh J.) in the judgment dated 22nd September 2017, dismissed his appeal and upheld both his conviction and sentence.

4. He has now preferred this appeal before us raising five grounds of appeal in the amended memorandum of appeal dated 12th February, 2024. He complains that the High Court erred in law by: failing to find that the voire dire as taken in the trial court was unlawful and unprocedural; failing to find that he was not furnished with witness statement as required by law; failing to find that the elements of the offence of defilement were not proved beyond reasonable doubt; and failing to re-evaluate the evidence as required by law. He prays that his appeal be allowed, his conviction quashed, his sentence set aside and that he be set at liberty.

5. This being a second appeal, our mandate under section 361 of the *Criminal Procedure Code* is limited to a consideration of matters of law. In *Karani v R* [2010] 1 KLR 73, the Court stated that:

> "By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

6. This position was recently restated by the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) when it stated:

> "Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law."

7. We note that the appellant has raised several new grounds before us that had not been raised before the High Court on first appeal. In particular, the appellant had not raised the issue of the voire dire taken by the trial court being unlawful or unprocedural, nor had he appealed on the ground that the elements of the offence of defilement were not proved beyond reasonable doubt. The law is that an appellant can only raise on second appeal matters of law relating to grounds of appeal that had been raised on first appeal. In effect therefore, only two of the appellant's grounds of appeal can be said to be properly before us, namely: that he was not provided with witness statements, which goes to the fundamental question of the right to a fair trial; and that the first appellate court did not properly re-evaluate the evidence before the trial court and reach its own conclusion.

8. Before considering the substance of the appellant's appeal, we set out briefly the prosecution evidence before the trial court, which was presented through four witnesses. PW1, ANM, was a child of 6 years. Upon the trial court conducting a *voire dire,* she was sworn and her evidence taken on oath. She told the court that on 17th May 2014, she had gone to the river to wash clothes with her mother (PW2) and brother. Her mother sent her to get a 'ngumu' (a mandazi or bun) from the appellant, whom she referred to in her testimony as 'Njiru.' She testified that when she met the appellant, he put the sack that he was carrying down and asked her to lie on it and remove her clothes;

9. PW1 testified that she complied and removed all of her clothes.

She testified further that the appellant lay on her and she felt pain in her genital; that she bled and the appellant told her to wipe herself with a piece of paper and throw it in the toilet and told her that he would give her a mandazi; and that she went back to her mother. PW1 testified that she had pain in her genitals and could not sit well at school. She stated that her mother noticed and took her to the hospital, and PW1 told the doctor what had happened, and she and her mother later went to report the matter at Shamata Police station. PW1 identified the appellant in court, stating that "Njiru is ours. He used to live at our place and used to cook 'ngumu'."

10. The complainant's mother, LMM (PW2), testified that she had gone to the river to wash clothes with her children, PW1 and R, a son aged 3. She sent them home to get 'ngumu' from the appellant, and her son R. was given 'ngumu' and sent back to her but ANM was left. PW1 testified that she did not notice anything but on 19th May, 2014, the complainant returned from school at 2.00 p.m instead of 1 p.m. PW2 gave her food and noticed that she did not want to sit down but wanted to eat while standing; that when PW2 asked her what was wrong, PW1 said she was feeling pain in her legs.

11. PW2 took the complainant to the hospital at Ol Kalau and the complainant confided in the doctor who examined her, who then asked PW2 who Njiru was. The following day, the complainant's father reported the incident at the police station, while PW2 and the complainant went back to the hospital. PW2 testified that ANM was 6 years old and produced a birth certificate showing that she was born on 9th January, 2008. It was her testimony that the appellant, who had been employed by her husband, had worked at their home for one month, to cook 'ngumu' and go to the shamba.

12. PC Denis Barasa (PW3), the investigating officer, received the report of PW1's defilement from the complainant and her parents at Ndaragwa Police Station. He issued the complainant with a P3 form and sent them to the hospital where the form was completed by Peter Nginyo (PW4), a clinical officer at J. M. Kariuki District Hospital. PW4 examined PW1 on 22nd of May, 2014. He testified that the complainant went to the hospital 7 days after the incident. He noted that she had difficulty in walking and pain when passing urine. He further noted that the external genitalia was normal but the hymen was broken. He observed that the complainant had been brought to hospital 7 days after the incident and that spermatozoa could only be found within 72 hours of the incident.

13. When placed on his defence, the appellant denied committing the offence. He testified with regard to the day of his arrest, stating that he had woken up and gone to sell 'ngumu', and that when he returned, he was arrested.

14. At the hearing of this appeal, the appellant appeared in person and relied on his submissions dated 12th February, 2024. The respondent, represented by Mr. Omutelema, Senior Assistant Director of Public Prosecutions, relied on submissions dated 18th March, 2024.

15. We identified earlier in this judgment the two grounds of appeal that are properly before us. The first is whether the first appellate court erred in not finding that the appellant was not supplied with witness statements as required. In his submissions on this issue, the appellant submits that he took plea on 25th May 2014; that thereafter, it is not clear whether he was supplied with the statements; that the prosecution merely stated '5 witnesses, 5 pages statements'. He submits that he was not given statements as he did not ask questions that he was required to ask as a person who was ready for the hearing. He also submits that he was a person who ought to have been given the services of an advocate.

16. In submissions in response on this issue, the respondent contends that the appellant did not raise the issue before the trial court and that it is just an afterthought, and should be rejected. The respondent submits, however, that the record shows that the prosecution addressed the trial court and stated "5 witnesses, 5 pages witness statements."

17. We have considered this issue against the record of the trial court. We note that indeed, on 25th May 2014, the prosecutor did make the above statement with respect to the witnesses and statements. Thereafter, the trial proceeded with no objection from the appellant, who cross-examined all the witnesses presented by the prosecution. We agree with the observation of the first appellate court, before which the appellant also raised this issue, that it was unfortunate that the trial court did not record that the appellant had been supplied with witness statements. The fact, however, that the trial court recorded the prosecution as indicating that there were five witnesses and '5 pages witness statements' on the date the appellant took plea, and thereafter the matter proceeded, with cross-examination of the witnesses and no complaint by the appellant, was an indication that he was supplied with the statements. We are satisfied that this ground is without merit.

18. The second of the appellant's grounds properly before us is that the first appellate court failed to re-evaluate the evidence before the trial court and reach its own conclusions. We have read the judgment of the High Court impugned in this appeal. We note that upon setting out the evidence of the four witnesses presented by the prosecution and the appellant's defence, the court made the following analysis and conclusions:

> " Coming to the crucial issue of whether the offence of defilement was proved, PWl was alone when she was allegedly defiled. This offence was committed in broad daylight. The mother seems not to have been keen or observant in taking care of the child because she did not notice what had happened to the complainant sooner. PW1 identified the appellant as the perpetrator. The appellant was a person who was working for them at the time. PWl said so and so did PW2. The trial court believed them. The appellant now alleges that he was framed, something he never raised in his defence. He did not even allude to the reason why PWl, a child of 6 years would frame him. The complainant explained what happened to her- the appellant undressed her and lay on her and she felt pain in her genitalia. By the time PW2 noticed that all was not well with PWl about 6 days later, she was not walking properly nor could she sit. PW4, the doctor who examined PWl after 7 days said spermatozoa could only be traced within 72 hours but that the complainant's hymen was perforated. That evidence corroborated PWl 's evidence that indeed she was defiled by the appellant. I am satisfied that the trial court did evaluate the evidence on record and came to the correct finding that the offence of defilement was proved beyond any reasonable doubt. The appellant's defence was a bare denial and I dismiss it as such."

19. Having considered the appellant's grounds of appeal against the judgment of the first appellate court, we are satisfied that this appeal is without merit.

20. The appellant concludes his submissions before us by praying that this Court should review the life sentence meted out against him and substitute it with a lenient sentence, taking into account recent jurisprudence that has held that a life sentence is harsh and unconstitutional. He submits that this Court should consider that he has taken up rehabilitation programmes which have helped in shaping his life. With respect to this latter submission, one does wish that the appellant, like others in his situation, engaged early on in his life in programmes that directed his mind away from the egregious offence of molesting children barely out of diapers. Entering into such programmes after conviction is all very well and will doubtless impact his life for the better. It does not, however, have an impact on the sentence meted out by the trial court and upheld by the first appellate court. This is more so in light of the recent decision of the Supreme Court, which is binding on this Court, in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (*supra*).

21. In its decision on an appeal by the Director of Public Prosecutions from a decision of this Court reducing the sentence of the respondent who had been convicted of the offence of defilement, the apex court put paid to the developing jurisprudence that its decision in *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment) applied, by parity of reasoning, to the minimum sentences prescribed under the Sexual Offences Act. It held that "the mandatory minimums when properly applied, strike the appropriate balance between the rights of the accused and the need to protect victims and the public." It held, further, that the constitutionality or otherwise of minimum sentences under the Sexual Offences Act would need to be tested through the hierarchy of courts before ultimately reaching the Supreme Court for consideration and determination.

22. Ultimately, we find no reason to disturb the decision of the first appellate court. We dismiss the appeal and uphold both the appellant's conviction and sentence.

23. Orders accordingly.

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

MUMBI NGUGI

.....

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