Kamacha v Republic (Criminal Appeal E042 of 2023)
[2024] KECA 1487 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1487 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E042 OF 2023

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

OCTOBER 25, 2024

BETWEEN

SANTA KENGA KAMACHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (S. M. Githinji, J.) delivered on the 21st day of June 2022 in HCCRA NO. E023 of 2022.)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Malindi (S. M. Githinji, J.) delivered on 21st June 2022 in Criminal Appeal No. E023 of 2022. By the impugned judgment, the High Court upheld the appellant's conviction and sentence in Kaloleni Sexual Offences Case No. E030 of 2021 (Mrs. L. N. Wasige, PM) vide the trial Court's Judgment dated 21st March 2021.

2. The genesis of the appeal before us is that the appellant was charged before the Chief Magistrate's court at Kaloleni with the offence of defilement, the particulars being that, on diverse dates between the month of March 2020 and 7th July 2021 at Mwanamwinga Location in Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of G.F.N., a child aged 16 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

3. The appellant pleaded not guilty to the charges whereupon the case proceeded to hearing. The prosecution called four (4) witnesses. The complainant, GFN (PW1), was sworn in after a voir dire examination was conducted. She stated that the appellant was her boyfriend; that their relationship started in 2019 after the appellant met her while on her way to the shop; that the appellant told her that he loved her; and that she went to the appellant's house at Kadzangweni near their home on two

occasions in March 2020 and July 2021 and had sex with him. According to PW1, they had sexual intercourse more than three times.

PW1 stated further that, one day in the year 2021, she spent the night at the appellant's house and returned home the following morning at 6:00 am; that, when her brother found out and confronted her, she admitted that she was from the appellant's house; that the matter was reported to Kaloleni Police Station where she recorded a statement; that she was taken to Mariakani Sub-County Hospital where she was examined and found to be five months pregnant; and that the appellant, who was the only man she had sex with, was responsible for her pregnancy.

4. The complainant's mother, TC (PW2), testified that PW1 was 16 years old, but did not have a Certificate of Birth. PW2 told the trial court that, sometime in 2021, PW1 left home and did not return until the following morning; that, when she questioned her, she learnt that PW1 had a romantic relationship with the appellant and had spent the night at his house; that the appellant was well known to her; that she reported the matter to the chief's office; that the appellant was arrested and taken along with PW1 to Kaloleni Police Station where PW2 recorded her statement; and that PW1 was thereafter taken to Mariakani Sub County Hospital for medical examination whereupon she was found to be pregnant.

5. Veila Kina (PW3), the Investigation Officer attached to Kaloleni Police Station, stated that she received the complaint from the area sub-chief of Viragoni, who had summoned the complainant and the appellant; that she proceeded to the sub-chief's office and interrogated PW1, who stated that she was in a relationship with the appellant; that the relationship started during the corona virus pandemic; that PW1 would meet the appellant whenever she was sent to the shops; and that she had had sex with the appellant in his house; that, on 7th July 2021, PW1 visited the appellant and spent the night with him; and that, when she returned home the following morning, and upon interrogation by her parents, she disclosed to them that she was from the appellant's house. PW3 stated further that she arrested the appellant and had him charged with the offence of defilement.

6. PW4, Mwangolo Chigulu, a Senior Clinical Officer at Mariakani Sub- County Hospital, testified that PW1 was brought in on 12th July 2021; that she was assessed and found to be 16 years of age as shown in the age assessment report dated 12th July 2021; that he examined her and prepared treatment notes and a P3 form both dated 12th July 2021; and that, upon examination, PW1 was found to have no hymen, had loose vaginal sphincter muscles, and was 9 weeks pregnant. PW4 concluded that PW1 was pregnant secondary to defilement.

7. When found to have a case to answer, the appellant gave an unsworn statement in his defence, but did not call any witnesses. He told the court that he was 24 years old, a boda-boda rider , and a resident of Viragoni; that he knew PW1 as they had attended Viragoni Primary school together; and that, in 2019, he approached PW1 and proposed to marry her as soon as she finished her studies, and the she accepted his proposal. The appellant averred that he had never had sex with the appellant; and that the she was told by her aunt to lie in court so that the appellant could be jailed. He denied responsibility for her pregnancy and stated that the charges against him were fabricated.

8. In its judgment dated 21st March 2022, the trial court found that the prosecution had proved that the complainant was a minor, and that she had been defiled. The trial court was also satisfied with, and found credible, the evidence of PW1 that she had a relationship with the appellant and that he had sex with her. Satisfied that the prosecution had proved its case beyond reasonable doubt, the trial court proceeded to convict the appellant.

9. During sentencing hearing, the trial court considered the appellant's mitigation that he was a first offender; that he was remorseful; and that he assisted his mother in taking care of his brother. The court

was of the view that there was need for a deterrent sentence, and that the court's hands were tied with regard to the sentence, which was mandatory. It sentenced him to 15 years imprisonment.

10. Dissatisfied with the learned Magistrate's decision, the appellant filed an appeal in the High Court of Kenya at Malindi in Criminal Appeal No. E023 of 2022 on the grounds that the prosecution did not prove its case to the required standard; that the prosecution's case was contradictory; that the conviction and sentence were against the weight of evidence; and that his defence was not fully considered.

11. In its judgment dated 21st June 2023, the High Court found that the prosecution evidence had proved all the ingredients of the offence of defilement. Accordingly, the learned Judge found no reason to interfere with the trial court's decision to convict and sentence the appellant. Dismissing the appeal, the learned Judge had this to say:

> "On sentence the 15 years imprisonment is within the law and the necessary factors were considered by the lower court in settling at it. I find no cause to interfere with the same. In the end, I find the appeal in want of merit and is hereby dismissed,"

12. Aggrieved by the decision of S. M. Githinji, J., the appellant lodged the instant appeal challenging the High Court decision on the grounds set out in his undated memorandum of appeal. The appellant faulted the learned Judge for: failing to find that the investigation was shoddily done; failing to observe that some witnesses were not recalled for cross-examination by the appellant; failing to appreciate that the prosecution failed to call crucial witnesses; failing to appreciate that the evidence relied on was circumstantial; failing to consider the appellant's defence, which was cogent and believable; failing to consider that the sentence was harsh and excessive; and for failing to consider the appellant's mitigation and the unique circumstances of the case.

13. In addition to the grounds of appeal aforesaid, the appellant filed an undated "Supplementary Grounds of Appeal" faulting the learned Judge for: not interfering with the sentence which was imposed on mandatory terms; not considering that the appellant was a first offender and was deeply remorseful; not considering that the evidence on record proved that the appellant and PW1 were lovers, a fact confirmed by PW1; and for failing to consider that the appellant was the sole breadwinner as his father had passed away.

14. In support of the appeal, the appellant filed undated written submissions citing the cases of Karingo vs. R [1982] KLR 213 for the proposition that a second appeal to this Court must be confined to matters of law only; Philip Mueke Maingi vs. DPP & Another (2022) KEHC 13118; Edwin Wachira & 9 Others vs. Republic [2021] eKLR;

    1. Mwangi vs. Republic [2022] KEHC 11226 (KLR); and Dismas Wafula

    2. Kilwake vs. Republic [2018] eKLR, all for the argument that mandatory minimum sentences are unconstitutional, and that they "deny the courts of their legitimate jurisdiction to impose discretionary sentences."; Francis Opondo vs. Republic [2017] eKLR, submitting that if an accused is a first offender, the sentence ought to reflect this fact, as the aim of the sentence is to encourage reform and discourage recidivism; Eliud Waweru Wambui vs. Republic [2019] eKLR, calling for a serious interrogation of the criminalisation of sexual conduct with children and the need for a national conversation regarding this sensitive issue; Wanyeso vs. Republic [2023] KECA 709 (KLR);

    3. Jared Koita Injiri vs. Republic [2019] eKLR; and Yussuf Dahar Arog vs.Republic [2007] eKLR, urging this court to find that the appellant has atoned for his sins, that his continued

incarceration will serve no useful purpose, and that his sentence should be replaced with a lesser definite sentence. The appellant urged us to allow his appeal, quash his sentence and set him at liberty.

15. In reply, learned State Counsel for the respondent, Mr. Mwangi Kamanu, opted to submit orally in opposition to the appeal, but cited no judicial authorities. Counsel urged the Court to dismiss the appeal and uphold the decisions of the two courts below on both conviction and sentence.

16. 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 vs. 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."

17. 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 two main issues of law, namely: whether the appellant was convicted on circumstantial evidence and, if the answer is in the affirmative, whether his conviction was safe; and whether the sentence meted on the appellant and upheld by the first appellate court was harsh or excessive, or otherwise unlawful. The remaining grounds raise issues of evidence, which we cannot re-open for reconsideration on 2nd appeal to this Court.

18. We form this view mindful of this Court's decision in Adan Muraguri Mungara vs. Republic [2010] eKLR where the Court set out the circumstances under which it will disturb concurrent findings of fact by the two courts 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. We find nothing on record to suggest that the concurrent findings of fact by the two courts below were bad in law or that they were reached on a perversion of the evidence. In the circumstances, we find no reason to justify interference therewith.

20. On the 1st issue as to whether the appellant was convicted on circumstantial evidence, the record as put to us clearly demonstrates that, to the contrary, the proceedings were replete with direct oral evidence of PW1, PW2, PW3 and PW4. The complainant (PW1) narrated the numerous incidents of sexual intercourse with the appellant who, in turn, submitted that they were lovers, and that they had agreed to get married as soon as she was done with school. Her mother (PW2)testified to her daughter's romantic relationship that led to her pregnancy, matters that PW1 confided in her mother. PW4 confirmed penetration and the pregnancy that resulted from the sexual intercourse between PW1 and the appellant. In sum, this ground of appeal fails, and for good reason.

21. To our mind, the evidence on which the appellant was convicted was by no means circumstantial but direct evidence, which is defined in section 63 of the *Evidence Act* (Cap. 80) thus:

> 63. Oral evidence must be direct.
>
> 1. Oral evidence must in all cases be direct evidence.

2. For the purposes of subsection (1) of this section, "direct evidence" means—

a. with reference to a fact which could be seen, the evidence of a witness who says he saw it;

b. with reference to a fact which could be heard, the evidence of a witness who says he heard it;

c. with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

d. with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

22. Black's Law Dictionary, Sixth Edition defines "direct evidence" in the following words:

> " Direct evidence is a piece of evidence often in the form of the testimony of witnesses or eyewitness accounts. Examples of direct evidence are when a person testifies that he/she - saw an accused commit a crime, heard another person say a certain word or words, or observed a certain act take place."

23. On the other hand, "circumstantial evidence" was defined and its probative value elucidated in R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20 where the court stated that:

> " Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

(See also Ahamad Abolfathi Mohammed and Another vs Republic [2018] eKLR andSawe vs. R [2003] KLR 364)

24. Turning to the 2nd issue as to the severity of the sentence, section 361 of the Criminal Procedure Code reads:

361. Second appeals

(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

SUBPARA (a)

on a matter of fact, and severity of sentence is a matter of fact;

25. This Court in MGK vs. Republic [2020] eKLR had this to say on the issue of sentence:

> " 16. As regards the sentence, under section 361(1) of the Criminal Procedure Code severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal."

26. We find no reason to depart from this Court's finding in MGK vs.Republic (ibid). The effect of section 361(1) of the CPC on this Court's powers on 2nd appeal are clear to our mind. The severity of sentence is a matter of fact not liable for reconsideration by this Court on second appeal and, consequently, the appeal likewise fails on this score.

27. Having considered the record of appeal, the impugned judgment, the grounds on which the appeal is anchored, the rival submissions for and against the appeal, the cited authorities and the law, we reach the inescapable conclusion that the appeal lacks merit and is hereby dismissed in its entirety. Accordingly, the judgment of the High Court (S. M. Githinji, J.) dated June 21, 2023 is hereby upheld. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER, 2024.

A. K. MURGOR

..... JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

..... JUDGE OF APPEAL

G. V. ODUNGA

..... JUDGE OF APPEAL

I CERTIFY THAT THIS IS THE TRUE COPY OF THE ORIGINAL

SIGNED

DEPUTY REGISTRAR