Kibe v Republic (Criminal Appeal 21 of 2019)
[2024] KECA 1441 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1441 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 21 OF 2019

MA WARSAME, JM MATIVO & WK KORIR, JJA

OCTOBER 11, 2024

BETWEEN

JOSEPH MWANGI KIBE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Naivasha High Court Criminal Appeal No. 48 of 2015
originating from Engineer CMCCR. Case No. 474/2013)

JUDGMENT

1. Joseph Mwangi Kibe, (the appellant) was charged, tried and convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No.3 of 2006 in Engineer Chief Magistrate's Court in criminal case number 474 of 2013 and sentenced to serve life imprisonment. The particulars of the offence were that on 21st August 2013 at Nyandarua County, he unlawfully caused his penis to penetrate the vagina of DW a Child aged 4 years.

2. Dissatisfied with the decision, the appellant appealed to the High Court at Naivasha. After hearing the appeal, Mwongo, J. upheld both the conviction and sentence and dismissed the appeal. Undeterred, the appellant who is unrepresented filed the instant appeal citing five grounds. In summary, the appellant contends that: the complainant's age was not proved to the required standard; the medical evidence on penetration was not conclusive; the trial court failed to comply with section 200 of the *Criminal Procedure Code*; the prosecution case was full of inconsistencies, discrepancies and contradictions; the life sentence meted upon him is unconstitutional; and his mitigation was not considered.

3. Briefly, the prosecution case was that on 21st August 2013, the complainant (PW1) was sent by her mother LWK(PW2) to handover a sickle to the appellant who was employed by PW2's brother-in-law as a herd's boy. However, the complainant took long to return prompting PW2 to look for her. It was the PW2's evidence that PW1 failed to respond to her calls, but ultimately, she responded as she

emerged from the maize plantation. PW 2 over heard the appellant telling PW1 in kikuyu language not to tell her mum what had happened. Nevertheless, PW2 asked the complainant what happened, and she told her that the accused put his penis inside her vagina. The complainant was taken to Ol Kalou hospital where PW4, a Clinical Officer examined her and observed that her hymen was perforated. The incident was reported at Kipipiri Police Station.

4. During the hearing of this appeal, the appellant appeared in person while Mr. Solomon Njeru appeared for the respondent. In support of his appeal, the appellant submitted that the prosecution failed to tender conclusive medical proof linking him with the offence. He argued that according to PW4, nothing abnormal was found after he examined the complainant nor did he see any discharge and/or spermatozoa on her genitalia contrary to PW2's evidence that she saw sperms on the complainant's private part. The appellant argued that PW4's evidence raised doubts as to the truthfulness of the prosecution evidence. To buttress his submission, the appellant cited the case of *Joseph Otieno Deny v Republic* CR APP No. 177 of 2001 in support of the holding that inconclusive medical evidence is sufficient reason to give the appellant a benefit of doubt.

5. The appellant urged that section 200(3) of the *Criminal Procedure Code* was not complied with which prejudiced him because he was deprived of his right to re-call and cross-examine some of the prosecution witnesses before the new magistrate who took over the case.

6. It was also the appellant's submission that the complainant's age was not proved because no document was tendered to confirm her age and added that the evidence adduced gave her age as 4 and 5 years. He cited the case of *Dominic Kibet Mwareng v Republic* CR APP. No. 155 of 2011 where it was held that other than age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not suffice.

7. Lastly, regarding sentence, the appellant submitted that his mitigation was not considered since the mandatory life sentence deprived the court's judicial discretion to impose an appropriate sentence.

8. The respondent's counsel Mr. Njeru opposed the appeal on conviction and stated that the findings of fact and law by the trial court were sound and based on a well thought out reasoning. Regarding the complainant's age, Mr. Njeru submitted that during the voire dire examination, the trial court observed that the complainant was a child of tender years and that a birth notification was produced showing her age was below eleven years.

9. Regarding penetration, Mr. Njeru submitted that the complainant's evidence was that the appellant took her into a maize plantation and he inserted his Kinyanyui, a common term used by children denoting penis into her vagina. Further, her evidence was corroborated by PW4, the Clinical Officer who upon examining her observed that her hymen was freshly perforated.

10. Regarding the question whether the appellant was properly identified as the offender, Mr. Njeru submitted that PW1 identified the appellant by name and also recognized him at the dock. Counsel maintained that the complainant's evidence on identification was corroborated by PW2 who testified that she heard the appellant warning the complainant not to tell her mother what had happened. Counsel maintained that the complainant was clear that she was sent by her mother to take a sickle to the appellant. Counsel argued that the appellant did not advance any reason as to why PW1 and PW2 would frame him up and as a result, his evidence did not in any way dislodge the prosecution evidence against him.

11. Regarding the sentence, Mr. Njeru submitted that the sentence provided under section 8 (2) of the *Sexual Offences Act*, 2006 is life imprisonment, therefore it cannot be excessive considering the aggravating circumstances of the offence.

12. This being a second appeal, our jurisdiction is limited to consideration of matters of law only as stipulated under Section 361 of the *Criminal Procedure Code*. As was held in *Reuben Karari S/o Karanja v Republic* [1959] 1 EACA 146, a second appeal must be confined to points of law. As to what constitutes "matters of law" in relation to this court's jurisdiction as the second appellate court, the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 Others* [2014] eKLR characterized the three elements of the phrase "matters of law" as follows:

> "(a) the technical element: involving the interpretation of a constitutional or statutory provision;
>
> b. the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record; and
>
> b. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

13. Bearing in mind the scope of this Court's jurisdiction in a second appeal, we will address what we consider to be the issues for determination in this appeal, which are:

(a) whether the ingredients of the offence of defilement were proved to the required standard;

(b) whether the prosecution evidence was marred by contradictions and inconsistencies;

(c) whether the trial court violated the provisions of section 200 (3) of the *Criminal Procedure Code*; and,

(d) whether the sentence imposed is unconstitutional.

14. Regarding the question whether the ingredients of the offence were proved to the required standard, it is important to bear in mind that we are statutorily precluded from entering into a fresh re-evaluation and re-assessment of the evidence to decipher whether the findings of the lower courts are well reasoned and supported by law or not. This Court, on a second appeal will not interfere with concurrent findings of fact of the two courts below unless it is satisfied that there was in fact no evidence at all to support the finding, or that the two courts below wholly misunderstood the nature and effect of the evidence. This position was succinctly enunciated by this Court in *Kalameni v Republic* [2003] eKLR as follows:

> "We have said before, but it bears repeating, that on a second appeal, it is not the function of this Court to go into a fresh re-evaluation and re- assessment of the evidence to see if the findings of the lower courts are or are not supportable. This Court will not interfere with concurrent findings of fact unless it is satisfied that there was in fact no evidence at all to support the finding or that the two courts below wholly misunderstood the nature and effect of the evidence." (See also *Aggrey Mbai Injaga v Republic* [2014] eKLR and *Athanus Lijodi v Republic* [2021] eKLR).

15. The trial court and the first appellate court found that the evidence adduced established that the complainant was defiled by the appellant who was employed by PW2's brother-in-law as a herdsman. The complainant's evidence was corroborated by the Clinical Officer who testified that his findings on examination were that her hymen was freshly perforated, suggesting that there was penetration. Regarding the complaint's age, there is uncontroverted evidence that her notification of birth clearly indicated that she was aged 4 years.

16. On the question whether the appellant was properly identified as the offender, there is also uncontested evidence that he was known to the complainant, and that PW2 heard him telling the complainant not to disclose to her mother what had happened. The trial court and first appellate court considered the appellant's defence and found that it did not displace the prosecution evidence. In the circumstances, we are satisfied that there is no basis upon which we can interfere with the concurrent findings of the two courts below on matters of fact.

17. The other issue urged by the appellant is that the trial Court violated the provisions of section 200 (3) of the *Criminal Procedure Code* which provides:

> "(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witnesses be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right".

18. We have carefully read the record. It is manifestly clear that the appellant's entire trial was handled by only one magistrate that is G.N. Opakasi. Consequently, this ground of appeal is absolutely devoid of merit.

19. The other ground urged by the appellant is that the prosecution evidence was marred by inconsistencies and contradictions. The court's duty is to determine whether there were contradictions and inconsistencies in the prosecution evidence to the extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial court ought to have rejected the evidence. As was held by the Uganda Court of Appeal in *Twehangane Alfred v Uganda* [2003] UGCA 6, it is not every contradiction that warrants rejection of evidence. It subtly stated:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

20. The appellant's claim that the prosecution evidence was marred by contradictions and inconsistencies is premised on his argument that PW2 testified that the complainant was aged 4 and 5 years and that she also alleged that she saw spermatozoa on the complainant's genitalia, yet PW4 did not detect spermatozoa upon examining the complainant. From PW4's evidence, it is manifestly clear that he did not notice the presence of spermatozoa because the complainant was very young and it was therefore difficult for him to get the high vaginal swab as he had wished. Indeed, from the analysis as captured by the learned trial magistrate, there is no discrepancy because PW4 explained in details why a specimen of spermatozoa could not be extracted from the complainant. In any event, there is uncontroverted evidence by PW4 that his examination revealed that the complainant had a freshly perforated hymen which was clear evidence of penetration.

21. Contradictions in evidence of a witness must relate to material facts and must be substantial. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically and not to pick one statement from a witness' testimony. From our analysis of the arguments raised by the appellant, we find no merit on this ground of appeal.

22. The other ground urged by the appellant is that the mandatory life sentence imposed upon him is unconstitutional. We have considered the entire record. We note that the appellant did not raise this issue before the High Court. The constitutionality or otherwise of the life sentence was not an issue placed before the High Court for its determination. Therefore, the first appellate court did not have the benefit of applying its mind on the said ground. We find that the appellant having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him,it is obvious to us that he is precluded from addressing the said issue on appeal before this Court.

23. Nevertheless, the Supreme Court recently affirmed the lawfulness of life imprisonment prescribed by section 8 (2) of the *Sexual Offences Act* in Petition No. E018 of 2023, *Republic v Joshua Gichuki Mwangi and Others* when it stated that:

> "(57) In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities...
>
> (62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below."

24. Arising from our conclusions on each and every issue discussed above, the inevitable conclusion is that this appeal fails. Consequently, we find no reason to interfere with both the conviction and sentence. We therefore dismiss this appeal.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF OCTOBER, 2024

M. WARSAME

JUDGE OF APPEAL

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J. MATIVO

JUDGE OF APPEAL

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W. KORIR

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR