Magolo v Republic (Criminal Appeal E108 of 2023)
[2024] KECA 1408 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1408 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E108 OF 2023

PO KIAGE, A ALI-ARONI & LA ACHODE, JJA

OCTOBER 11, 2024

BETWEEN

ALVIN KABAKA MAGOLO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (Kemei, J.) delivered on 13th May 2020 in HCCRA No. 45 of 2019)

JUDGMENT

1. Alvin Kabaka Magolo, the appellant herein, comes before this Court by way of a second appeal, his first appeal having been dismissed by the High Court (Kemei, J.) on 13th May 2020.

2. The brief facts of the case are that the appellant was charged before the Chief Magistrate's Court at Mavoko with the offence of defilement, contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* ("the Act"). The particulars of the offence are that, on diverse dates between 1st April 2015 and 29th May 2015 in Athi River Sub-County within Machakos County, the appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of FNK a child aged 13 years.

3. In the alternative, the appellant faced the charge of committing an indecent act with a child contrary to Section 11(1) of the Act. The particulars being that on diverse dates between 1st April 2015 and 29th May 2015 in Athi River Sub-County within Machakos County, he intentionally and unlawfully caused his male genital organ (penis) to come into contact with the female genital organ (vagina) of FKN a child aged 13 years.

4. The appellant pleaded not guilty and the matter proceeded to trial where the prosecution called 6 witnesses. The evidence of the prosecution's witnesses may be summarized as follows; -

> PW1, FN, and the appellant were neighbors; she used to go with a friend to watch movies at the house where the appellant lived with his aunt; that one day between April and May 2015, during one of these movie sessions, her friend was pulled away by one Kelvin, leaving PW1 alone with the appellant; the appellant asked PW1 if she knew what he wanted, and she replied that she did not. The appellant's brother entered and PW1 left the room. That she returned to the said house to borrow a matchbox and the appellant held her, put a piece of cloth in her mouth, and told her that she would know what he wanted, he put her on the bed and removed her skirt; he then removed his shorts and boxers, removed a condom from a bag and defiled her; she felt pain but could not scream as the appellant had inserted a piece of cloth in her mouth; she did not inform anyone of the incident; that in April 2015, she visited the appellant's aunt to borrow a matchbox but found the appellant alone; he called her back as she was leaving, inquiring about her work and the reason why she was looking for a matchbox; she informed him that she had work and needed the matchbox to light a jiko for cooking; the appellant threw her onto the bed, removed a condom from the same bag as the previous time, sexually assaulted her; and warned her not to disclose what had happened to anyone; that on 29th May, 2015, PW1 was helping her neighbor babysit when the appellant sent her to buy for him credit for his phone for Kshs.20; upon her return, she found the appellant sitting on the bed; he proceeded to take her shoes, hid them in a box, and then made her lie on the bed, where he sexually assaulted her for the third time; that a neighbor, Mama S, got to know of the incident and informed PW1's mother about it; that upon being interrogated by her mother she narrated the entire ordeal to her; they then went to PW6's residence with her and as they were narrating the matter to the PW6, the appellant and a friend came to PW6's place; after which they all went to the police station; thereafter she was taken to Nairobi Women's Hospital, where she was admitted for one day.

5. PW2, Maureen Maitha, a clinical officer at Athi River Health Centre, testified that she examined PW1 and filled her P3 form on 3rd June 2015; that PW1 was aged 13 years old and claimed that she had been defiled; she examined PW1 and found the hymen torn; a urine test showed urinary infection; the genitalia had no injuries; she learnt from PW1, that the perpetrator had been using a condom.

6. PW3, Christine Kiteshuo, a medical officer at Women's Hospital in Kitengela testified that PW1 was examined by her colleague Dr. Musese with whom she had worked for seven (7) years and whose handwriting she was familiar; that her colleague examined PW1 on 31st of May 2015; that PW1 did not have any physical injury but her genitalia had a whitish discharge; the hymen was torn; HVS, HIV, and Syphilis tests were done; her hemoglobin was found to be normal; that upon examination the doctor concluded that PW1 had penile penetration; there was no presence of sperm in the urine; that a urine analysis conducted on 31st May 2015, revealed the presence of particles, indicating the presence of an infection; that the Post Rape Care form was filled on 1st June 2015.

7. PW4, AK PW1's mother testified that on returning home from work at about 5 pm on the 30th May 2015, she did not find her daughter at home. She learnt from a neighbour that PW1 had been seen by some construction workers leaving a certain house and she did not look well. Surprised by the news PW4 confronted PW1 who narrated how the appellant had defiled her severally. PW4 took PW1 to their pastor (PW6) for advice. While at PW6's house, the appellant and his brother showed up. PW6 enquired from the appellant if he knew PW1, and the appellant said he knew her as his neighbor. PW6, then inquired from the appellant if he had had sex with PW1, and the appellant admitted that it had

happened three times. With the admission from the appellant, PW6 advised PW4 to report the matter at Mlolongo Police Station. PW1 was later taken to the hospital.

8. PW5, Cpl. Jane Ngige, the investigating officer, testified that on 1st June 2015, she received reports from two women claiming that their daughters had been defiled on 29th May 2015. She took the girls to hospital where it was ascertained that PW1 had been defiled. On interrogating PW1, she identified the appellant as the perpetrator and informed her that she had gone looking for a matchbox at their neighbour's where she found the appellant, who in turn sent her to buy for him airtime. On return the appellant got hold of her, defiled her, and warned her not to tell anyone as he would kill her; on interrogating the appellant denied having committed the offence.

9. PW6, Geoffrey Amunga, a pastor with the Light House Christian Church in Mlolongo Phase III was summoned by the trial court as a witness. He testified that on 30th May 2015, while he was at his place, 6 ladies and 2 small girls' P and N came to his home. One of the ladies told him that the girls had been assaulted sexually, while still with the ladies two boys joined them, and one of the boys was identified by the ladies as the perpetrator. On questioning the girls PW1 told him that the appellant had defiled her. The appellant admitted having sexually assaulted PW1; upon which PW6 tied his hands and took him to the police station. The two girls were then taken to hospital.

10. At the close of the prosecution's case the trial court found that the appellant had a case to answer and placed him on his defence. The appellant gave unsworn testimony denying the main and alternative charges. It was his testimony that on the 29th May 2015, he watched a movie at his brother's house with his friend Kevin, later Kevin suggested they take a walk around the estate and they ended up at PW6's house, where they found PW1 and her mother. PW6 asked them questions that he could not comprehend. When they did not respond as PW6 expected, PW6 took them to Athi River Police Station, where he was held and later charged with the offence facing him. He claimed that the prosecution's witnesses had conspired to frame him with the charge.

11. The trial court having carefully considered the evidence by both the prosecution's witnesses and the defence was persuaded that the appellant committed the offence. The court convicted the appellant and sentenced him to 20 years' imprisonment. The appellant was aggrieved with the outcome of the case and appealed to the High Court against both conviction and sentence in Criminal Appeal No. 45 of 2019. In its determination, the High Court affirmed both the conviction and sentence dismissing the appeal in its entirety.

12. The judgment of the High Court precipitated the appeal before us. In his memorandum of appeal, the appellant raised grounds which we take liberty to summarize as follows; the learned judge erred in law: by failing to appreciate the fact that the appellant was not fully informed of all his rights as enshrined in *the Constitution*; by upholding the conviction despite contradictory, uncorroborated and unreliable evidence occasioning serious miscarriage of justice; by failing to observe that the trial magistrate shifted the burden of proof to the appellant; and by disregarding Section 333(2) of the Criminal Procedure Code.

13. The matter proceeded by way of written submissions, with brief highlights at the plenary hearing. The appellant submits that the trial court sentenced him to serve 20 years' imprisonment from the date of conviction and it did not take account of the provision of Section 333(2) of the Criminal Procedure Code as the period was required to run from the date of arrest, which was 30th May 2015.

14. He further submits that the court was under a duty to comply with Section 19 of the Oaths and Statutory Declaration Act by conducting a voire dire examination to satisfy itself that the child understood the nature of the oath. In support he relies on the case of Johnson Muiruri vs. Republic

[2013] eKLR, where the court upheld the importance of conducting a voire dire examination, and the case of Republic vs. Lal Khan [1981] 73 CA 190, where the court held that questions put to a child must appear on the shorthand notes so that the appellate court could satisfy itself on whether that important procedure was properly followed. He also drew our attention to the case of Muthama Munguti vs. Republic [2016] eKLR where the court held that, where the trial court opted to record answers only then it was incumbent upon it to record the questions asked as well.

15. He submits that PW1 was not a believable witness as the statement made to the police was at variance with the evidence adduced in court; that since there were discrepancies and contradictions, there was the need to have corroboration to strengthen the inconsistent evidence given and cites the following cases; Alexander Nyachiru Maruse vs. Republic [1986] eKLR, Wangombe vs. Republic [1980] KLR 149 and Thomas Oluoch Okumu vs. Republi [2001] eKLR.

16. Further the appellant submits that the investigations done were shoddy; that PW5 testified that it was the complainant's mother who reported the case and was not aware that the complainant was forced to give a wrong statement. Further PW5 did not have exhibits nor did she visit the scene; further that the evidence of PW1, PW2, PW3, PW4, and PW6 was not credible within the meaning of Section 163 of the *Evidence Act* and that the trial court overlooked this, hence the conviction was untenable.

17. The appellant further submits that the prosecution's case was not proved beyond reasonable doubt and relies on the case of Langat Dinyo Domokonyang vs. Republic [2017] eKLR and Charles Odhiambo Okumu vs. Republic [2018] eKLR. He adds that the critical ingredient of penetration was not established.

18. The appellant further submits that the sentence was harsh and unfair; that the court failed to consider his defence and his mitigation. In support, he relies on the case of Evans Wanjala vs. Republic [2019] eKLR, where the court set aside the imprisonment term of 20 years and substituted it with a term of 10 years. He also relies on the case of Patrick Malombe Masaku vs. Republic [2019] eKLR, where the court held that there were several degrees of defilement in the *Sexual Offences Act* and to treat offences as the same notwithstanding the aggravating circumstances violated the right to dignity as the offenders were treated as a bunch rather than individuals.

19. Lastly the appellant submits that the burden of proof was shifted from the prosecution to him to prove his innocence and this should not have been the case as the burden lies with the prosecution to prove his guilt. He relies on the cases of Woolmington vs. DPP [1935] A.C 462 and Miller vs. Minister for Pensions [1947] 2 All CR 372. To buttress the above point, he relies on the case of J.O.O vs. Republic [2015] eKLR, where the court held that the standard of proof required in criminal cases was proof beyond any reasonable doubt and that it was better to acquit ten guilty persons than to convict one innocent person.

20. The respondent has filed submissions dated 26th April 2024 and submits that this being a second appeal, only matters of law fall for consideration by the court and that where there is a concurrence of findings of fact, the same can only be disturbed or interfered with, if it is shown that the findings were based on no evidence or based on a misapprehension of the evidence or that the courts below are shown to have acted on wrong principles when arriving at the findings.

21. The respondent submits further, that the trial court found PW1 to be truthful, candid, and consistent in her evidence and the identity of the appellant. Further, the trial court found the evidence fully corroborated by the testimony of other witnesses. As for the High Court, it submits that the court properly re- evaluated the evidence, made concurrent finding of facts, and confirmed independently that the evidence on record sufficiently proved beyond reasonable doubt the offence charged and

specifically made a finding that there was no contradiction concerning the elements of the offence and therefore the ground raised by the appellant in that regard failed.

22. The State further submits that the inconsistency as to what PW1 went to collect from the appellant is not material as it did not affect proof of the elements of the offence, and that in any case, PW1 narrated that the two different incidents occurred on two different days. The State further submits that there is no reason to interfere with the sentence, as it is the minimum sentence in law, and that the evidence on record proved beyond a reasonable doubt all the elements of the main charge, and the appellant was rightly convicted and granted a lawful sentence.

23. This matter comes before us on a second appeal. Section 361(1) (a) of the Criminal Procedure Code limits our mandate to only matters of law. Further, the court will not interfere with concurrent findings of facts by the two courts below, unless such findings were not based on evidence, for a misapprehension of the evidence, or that the courts below acted on wrong principles in arriving at the findings. This provision has received judicial interpretation in numerous decisions of this Court, see for instance the cases of Chemogong vs. Republic [1984] KLR 611, Ogeto vs. Republic [2004] KLR 14, and Koingo vs. Republic [1982] KLR 213. In the latter case, the court stated that:

> " 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 it is based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karasi s/o Karanja V. R. [1956] 17 E.A.C.A 146)."

24. We have carefully considered the record, submissions by the rival parties, and the law. We take note that although the memorandum of appeal was confined to only four issues, the appellant had elaborate submissions covering several grounds not contained in his memorandum of appeal, and the State either out of caution or in error addressed the said issues. For our part, we shall not delve into issues not addressed in the memorandum of appeal or arising from the judgment of the High Court. For instance, the appellant did raise the issue of violation of his constitutional right under Articles 49 and 50 of *the Constitution* which was not raised at the High Court. The issue is being raised for the first time now which is not permissible.

25. We discern the issues for our determination therefore to be:

    i. Whether the prosecution's evidence was fraught with contradiction, and inconsistencies and was not corroborated;

    ii. whether both courts below ignored the provisions of Section 333(2) of the Criminal Procedure Code.

26. It is the appellant's submission that the evidence adduced by PW1 was contradictory to the statement she gave to the police and therefore her evidence ought not to have been relied upon. For starters, this claim did not arise in the lower court or the first appellate court, though the appellant did complaint about the evidence of PW1 not being corroborated, that she was coerced to implicate him, and that PW1's evidence and that of her mother differed on who gave information of the alleged incident to PW2. Both the courts below did not find major inconsistencies with the evidence in the prosecution's case and both found PW1 to have been consistent and truthful in her evidence.

The trial court stated:

> " ...I also observed that PW1 who was a child gave evidence that flowed well; This would have been difficult if she was coached."

The High Court on its part stated as follows on this issue:

> " ...The inconsistencies as to what PW1 came to collect from the appellant is not material as it has no effect on proof of the elements of the offence. In any event, PW1 narrated two different incidents that occurred and two different days."

27. On inconsistencies and contradiction, this Court in the case of Richard Munene vs. Republic [2018] eKLR, stated that; -

> " Contradictions, discrepancies, and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies, and inconsistencies are proved, they must be resolved in favour of the accused.
>
> It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

28. On corroboration the proviso to Section 124 of the *Evidence Act* provides that; -

> " Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

The proviso to Section 124 of the *Evidence Act* as shown above does not make it mandatory for corroboration of PW1's evidence since the trial court believed her evidence to be truthful and stated so. We see no reason to interfere with the finding of fact by the two courts below. We reiterate what the Court stated in the case of Karani vs. R [2010] 1 KLR 73:

> " This is a second appeal. 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."

29. On whether the court disregarded Section 333(2) of the Criminal Procedure Code, this Court in the case of Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR, held as follows:

> " ...the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that

the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person".

30. Section 333(2) of the Criminal Procedure Code provides as follows:

> " Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

31. The appellant complained in the High Court that Section 333(2) of the Criminal Procedure Code had not been considered at the trial court when passing sentence. The High Court appears to have overlooked the ground and did not address it at all. The complaint is justified as the time the appellant served in custody awaiting trial should have been considered.

32. In the end, we uphold the conviction. We also uphold the sentence of 20 years' imprisonment. Since the appellant remained in custody throughout the trial, having been arrested on the 30th of May 2015 and judgment entered on the 12th of April 2016, the appeal partially succeeds to the extent that the sentence will begin to run from the appellant's date of arrest.

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

P.O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR