Babuya v Republic (Criminal Appeal E058 of 2022)
[2024] KECA 1572 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1572 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E058 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

NOVEMBER 8, 2024

BETWEEN

SULEIMAN JILLO BABUYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Garsen (Nyakundi, J.) delivered on 15th September 2021 in HCCRA No. 36 of 2019)

JUDGMENT

1. This is a 2nd appeal from the judgment of the High Court of Kenya at Garsen (R. Nyakundi, J.) dated 15th September 2021 in which the learned Judge upheld the appellant's conviction by the Senior Resident Magistrate's Court at Hola (A. P. Ndege, PM) in Sexual Offences Case No. 7 of 2018, but varied the sentence from 18 to 15 years imprisonment.

2. The genesis of the appeal before us is that the Appellant, Suleiman Jillo Babuya, was charged with defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006 (the Act). The particulars of the offence were that, between the 24th day of May 2018 and 29th day of June 2018 in Tana River Sub-County within Tana River County in the Coastal Region, he unlawfully and intentionally caused his penis to penetrate the vagina of AGO, a girl aged 16 years.

3. In addition, the appellant was also charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Act*, the particulars being that between the dates and at the place aforesaid, he unlawfully and intentionally touched the vagina of AGO, a girl aged 16 years with his penis.

4. The appellant pleaded not guilty to the charges whereupon the case proceeded to hearing. The prosecution called seven (7) witnesses, including the complainant, AGO, who testified as PW1. Taking

note of the exclusion of page 5 of the proceedings in the trial court, PW1's testimony is gathered from page 6 of the proceedings (which appears at page 7 of the record of appeal) and from her report to, and as testified by, the investigating officer, Tobias Odwuor Odege (PW5), which appears on pages 13 and 14 of the record of appeal as put to us.

5. PW1 testified that she was 16 years old and a Form 1 student at [Particulars Withheld] Secondary School; that she escaped from home because her father, one O, wanted to marry her off to someone in Tana Delta against her will; that she consequently fled to her aunt's village in M where she arrived at 7pm; that her aunt, BW (PW2), requested for a boda boda to take her to Hola where she (PW1) would board a bus to Mombasa to join her sister; that the appellant, who she only met on that day, came along with the boda boda rider; that the appellant took advantage of her and took her to his brother's house; that she was locked in for seven (7) days before the appellant took her to his house in Mikinduni on 23rd May 2018 at 8pm; that, thereafter, the appellant lived with her as a man and wife for the period between 23rd May 2018 and 29th June 2018; that the appellant inquired about her age and she revealed to him that she was 17 years old; that the appellant used to have sex with her every day; and that the appellant would lock her up in the house whenever he went to work.

6. PW1 testified further that, on 29th June 2018 at about 7:00 am, she managed to escape after the appellant left for work; that she fled to her friend J's house before she travelled by motorbike to another friend's house in Bondeni where she spent the night; that, on the second day, she travelled to her aunt's place in M and arrived very early in the morning; that the very next day, the appellant and his uncle came for her; that she refused to accompany the appellant back to his house in Mikinduni and insisted on either being taken back to her parents or to a police station; that she called her father, who directed her to travel to Mikinduni in the company of the appellant to meet him; that, along the way, they had an accident after PW1 intentionally shook the motorbike on which they were riding; that, following the accident, they crossed over to [Particulars Withheld] Police Station where they were interrogated and the appellant arrested. According to PW1, she spent the night at the police station before being escorted to Hola County Hospital for a medical exAtion; and that she was found to be pregnant.

7. The complainant's aunt, BW (PW2), testified that, on 15th May 2018, PW1 came to her home and informed her that her parents wanted to marry her off against her will; that PW1 requested for money to travel to Mombasa; that PW2 went to Majengo and got PW1 a boda boda to take her to Hola where she would board a bus to Mombasa; and that the appellant, who was known to PW2, went along with PW1 on the boda boda. PW2 further testified that on 6th July 2018, she was summoned to appear at [Particulars Withheld] Police Station where she came to learn that PW1 had been married off to the appellant.

8. The complainant's niece, FH (PW3), testified that, on 30th June 2018 at 6.00 a.m, she woke up to find PW1 at her home; that she asked PW1 why she was visiting; that PW1 told her that she wanted her assistance and that she had escaped "from another man at Mikinduni"; and that PW3 called her mother and requested her to inform PW1's father of her whereabouts. It was PW3 testimony that PW1's father called and informed PW3 that PW1 had ran away, and that he would come for her the next day; that, on the following day at 4pm, the appellant accompanied by an individual who introduced himself as the appellant's father came for PW1; and that PW1 initially resisted, but eventually agreed to leave with them.

9. PC Patrick Ngari (PW4) attached to Hola Police Station stated that, on 30th June 2018 at 2pm, the appellant came to report that his wife, whom he referred to as A, had gone missing; that his attempts to locate her had been futile; that PW4 recorded a lost person's report; and that he referred the appellant to the Crime Office for further investigations.

10. PC Tobias Odwuor Odege (PW5) attached to [Particulars Withheld] Police Station Anti – Crime Office stated that, on 2nd July 2018, she received at the station PW1, the appellant and an individual who introduced himself as the appellant's father; that the appellant alleged that "his wife" (PW1) ran away on 29th June 2018 and went to stay with PW3 before he eventually went and picked her; that PW5 interrogated PW1 who repeated her version and recollection of the events as stated above; and that she subsequently arrested the appellant and escorted PW1 to Hola County Hospital for a medical exAtion the very next day.

11. PW 6, Najla Said Mohamed, a Medical Officer at Hola County Hospital, testified that she examined PW1 on 3rd July 2018 and prepared a P3 form - exhibit No. PMFI 3; that, upon exAtion, PW1 was found to be in good condition; that she had no lacerations on her vagina; that her hymen was not intact; that she had a foul smelly vaginal discharge; and that she was seven (7) weeks pregnant.

12. PW 7, Patience Munyazi, a Clinical Officer at Hola County Hospital, testified and essentially repeated PW6's testimony. PW7 produced in evidence PW1's treatment notes as exhibit PMFI 2.

13. When found to have a case to answer, the appellant gave a sworn statement in his defence. He stated that he did not rape the appellant; that he went to the complainant's home, paid dowry and was given the complainant as his wife; that, from then on, they cohabited as man and wife and had sex in a marital relationship; that he followed religious customs; that PW1 had been married before to a Christian, but was taken away by her parents on account of their religious differences; and that when the complainant escaped, they went to look for her at her aunt's place and thereafter proceeded to the police station.

14. To buttress his defence, the appellant called AK (DW2), a farmer and neighbour, who testified that the appellant "used to walk at the village with the girl [PW1] as his wife" together with his (DW2's) brother, one BOJ (DW3).

15. DW3 testified that, on 15th May 2018 at 10pm, PW1 and the appellant came to his home where they spent the night together as a couple; that, in June 2018, he accompanied the appellant to PW1's father's home to pay dowry; that they paid Kshs 8,500 as pre-dowry; that, thereafter, PW1 and the appellant continued to cohabit as husband and wife.

16. In his judgment dated 10th September 2019, the trial magistrate found that the complainant had proved that, in the course of her "marriage" to the appellant, the appellant had penetrative sexual intercourse with her; that the appellant was correctly charged with the offence, and that the prosecution had proved the offence to the required standard. Consequently, the trial court convicted the appellant and sentenced him to 18 years' imprisonment.

17. Dissatisfied with the learned Magistrate's decision, the appellant filed an appeal in the High Court of Kenya at Garsen in Criminal Appeal No. 36 of 2019 on the grounds that no DNA testing was conducted to ascertain the paternity of the complainant's child; that the prosecution's evidence was full of contradictions and discrepancies; and that his mitigation was not considered during sentencing.

18. In its judgment dated 15th September 2021, the High Court found that the appellant's age and the element of penetration had been proved; and that the appellant was properly identified as the perpetrator of the complainant's defilement. Accordingly, the first appellate Court dismissed the appeal, upheld the conviction, but varied the sentence from 18 to 15 years' imprisonment. In his judgment, the learned Judge had this to say:

> "I have no hesitation to interfere with the sentence of eighteen (18) years imprisonment by varying it to the minimum period of fifteen (15) years imprisonment as provided for under Section 8(4) of the *Sexual Offences Act* .... I think there is nothing useful presented by the

appellant to compel me to interfere with the findings by the Lower Court, save to the extent of sentence."

19. Aggrieved by the decision of R. Nyakundi, J., the appellant lodged the instant appeal challenging the High Court decision on the grounds set out in his undated memorandum of appeal, namely that the learned Judge erred in law by failing to: consider that the mandatory minimum sentence under section 8(1) of the *Sexual Offences Act* violated sections 216 and 329 of the Criminal Procedure Code; that the prosecution did not prove the charge to the required threshold; that the birth certificate produced was not an original or certified copy, contrary to sections 64 and 66 of the *Evidence Act*; and adequately consider the appellant's defence.

20. In addition to the grounds aforesaid, the appellant filed an undated "Supplementary Grounds of Appeal" containing 4 grounds, namely that the learned Judge erred in law by failing to: find that the trial court's judgment did not conform to the requirements of judgments pursuant to section 169 of the Criminal Procedure Code; to appreciate that the appellant had at his disposal a defence offered by section 8(5) and (6) of the *Sexual Offences Act*. The appellant also faults the learned Judge for upholding the sentence that was both harsh and excessive, without considering the appellant's mitigation and the unique circumstances of the case.

21. In support of the appeal, the appellant filed undated written submissions citing the cases of *Patrick Kihara Njoroge vs. Republic* [2002] eKLR; *Mahon vs. Osborne* [1939] 1 ALL ER 535 ; and *James Kamau Ndirangu vs. Republic* [2000] eKLR, submitting that the trial magistrate's judgment did not comply with section 169 of the *Criminal Procedure Code* by not providing: a fair summary of the evidence, the contentions by either side, the points for determination, the decision and the reasons for the decision.

22. In addition, the appellant cited the cases of *Duncan Mwai Gichuhi vs. Republic* [2015] eKLR; *Salim Owino Chitech vs. Republic* [2012] eKLR; and *Mohamed Makhokha vs. Republic* [2013], submitting that the appellant had no reason to doubt the complainant's consent or capacity to consent to sexual intercourse; *Eliud Waweru Wambui vs. Republic* [2019] eKLR and *Gillick vs. West Norfolk and Wisbech Area Health Authority* [1985] 3 ALL ER 402 on the need to have the age of consent to sex lowered from 18 to 16 years in light of the realities and challenges of maturity, morality, autonomy and protection of children.

23. Finally, and on the authority of *Vincent Sila Jona & 87 others vs. Kenya Prison Service & 2 others* [2021] eKLR; *Joshua Gichuki Mwangi vs. Republic* [2022] KECA 1106 (KLR); *Dismus Wafula Kilwake vs. Republic* [2019] eKLR; *IMA vs. Republic* [2019] eKLR; and *MGK vs. Republic* [2020] eKLR, the appellant submitted that the sentence imposed on him by the trial court was not commensurate with the facts and circumstances of the offence. He prayed that his sentence be quashed or, in the alternative, substituted for a lesser definite sentence.

24. In reply, the respondent filed written submissions dated 5th May 2024 and prepared by Miss. Vallerie Ongeti, Principal Prosecution Counsel. Counsel cited the cases of *Moses Nalo Raphael vs. Republic* [2015] eKLR, requesting this Court to only consider matters of law, unless it is shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered, or that they were plainly wrong in looking at the evidence; *Richard Munene vs. Republic* [2018] eKLR, highlighting the settled principle that it is not every trifling contradiction or inconsistency in the prosecution's evidence that will be fatal to its case; and *David Mutai vs. Republic* [2021] eKLR, submitting that an appellate Court cannot interfere with the sentencing Court's discretion, unless it is established that there was real error on application of the sentencing guidelines.

25. 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."

26. 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 one main issues on points of law, namely whether the prosecution proved the charge against the appellant to the required threshold.

27. In our considered view, the remaining three grounds of appeal on points of law are raised for the first time before us and, as we will shortly demonstrate, do not, for good reason, fall to be determined. Neither do we have the jurisdiction to re-open and re-consider the impugned judgment on any of the three points of law not raised before, or considered by, the court below. For the avoidance of doubt, these points of law, which were not raised on appeal to the High Court, are that the learned Judge erred in: failing to consider that the complainant's birth certificate produced was not an original or certified copy thereof, contrary to sections 64 and 66 of the *Evidence Act*; failing to appreciate that the appellant had at his disposal a defence under and by virtue of section 8(5) and (6) of the *Sexual Offences Act*; and in failing to find that the trial court's judgment did not conform to the requirements of judgments pursuant to section 169 of the *Criminal Procedure Code.*

28. We hasten to observe that this Court has had occasion to consider the effects of raising an issue before this Court for the first time. In *Kenya Commercial Bank Ltd vs. Osede* [1982] eKLR, Hancox JA had this to say on the matter:

> "...that where the right of appeal is statutory, it is to be confined to points of law raised before and decided by the trial judge."

29. In the same vein, in *Kenya Commercial Bank Ltd vs. James Osede* (*supra*) Hancox JA also had this to say:

> "It (has) been clear for nearly a century and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been subject of argument and decision in the county court."

30. Likewise, in *Wachira vs. Ndanjeru* (1987), KLR 252, this Court spoke to the bar when Platt J.A observed as follows:

> "...the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case."

31. In view of the foregoing, the three points of law purported to be raised for the first time in support of the appeal before us fall by the wayside and count for nothing in determination of the appeal.

32. The same fate befalls matters of fact raised as grounds of appeal in the two undated memorandum and supplementary memorandum of appeal with regard to the appellant's defence, and to the severity of

the sentence meted on him. Suffice it for the moment to observe that we find no reason to disturb the concurrent findings of fact by the two courts below.

33. In *Adan Muraguri Mungara vs. Republic* [2010] eKLR, this Court set out the circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court 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]

34. On the issue as to the severity of the sentence meted on the appellant, he contends that the learned Judge was at fault in upholding the conviction and sentence albeit varied, but which the appellant views as both harsh and excessive. In addition, he contends that the learned Judge did not consider the appellant's mitigation and the unique circumstances of the case, all of which constitute matters of fact and judicial discretion to which we cannot pronounce ourselves on second appeal.

35. We take to mind the provision of section 361 of the *Criminal Procedure Code*, which 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—
>
> a. on a matter of fact, and severity of sentence is a matter of fact;

36. This Court in *MGK vs. Republic* [2020] eKLR

> "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."

37. Turning to the single issue of law as to whether the prosecution proved its case beyond reasonable doubt, we hasten to point out right at the outset that the evidence led by the prosecution proved the charge of defilement beyond reasonable doubt. The three (3) ingredients of the offence of defilement, namely: the age of the victim; penetration; and identification of the appellant were proved in accordance with section 8(1) and (3) of the Act (See E*dwin Nyambogo Onsongo vs. Republic* [2016] eKLR; and *Sigei vs. Republic* [2022] KEHC 3161 (KLR)).

38. It is noteworthy that none of the three ingredients of the offence with which the appellant was charged was disputed. In his defence, the appellant contended that the complainant was his wife; that he had married her and paid the requisite dowry; that he cohabited with and had sexual intercourse with her for the entire period of their cohabitation, which was confirmed by the complainant's testimony and the medical exAtion on which she was confirmed to be pregnant. Her age having been proved as 17 years, and the appellant's identity not having been in issue, the two courts below were satisfied, as we are, that the prosecution had proved its case beyond reasonable doubt. Simply put, none of the ingredients of the offence of defilement was challenged. The appellant's admission of having had sexual intercourse with the complainant for the period during which they cohabited was of itself sufficient proof of "penetration" within the meaning of section 2 of the Act to wit "partial or complete insertion of the genital organs of a person into the genital organs of another person." That is precisely what the

prosecution witnesses attested to, and what the appellant admitted as having done to the complainant (see *Sigei vs. Republic* [2022] KEHC 3161 (KLR)).

39. The decision of the High Court of Kenya at Bomet in *Sigei vs. Republic* [2022] KEHC 3161 (KLR), quoting the Supreme Court of Uganda in Bassita vs. Uganda S.C. Criminal Appeal Number 35 of 1995, buttresses the prosecution evidence. As the High Court correctly observed:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims' own evidence and corroborated by the medical evidence or other evidence." (Emphasis added)

40. In conclusion, the complainant's own evidence as corroborated by the medical evidence, coupled with the appellant's unequivocal admission of having had sexual intercourse with her, proved beyond reasonable doubt that the appellant defiled the complainant to whom he was well known. Indeed, we find nothing, as did the High Court, to justify interference with the trial court's decision to convict the appellant. Consequently, we find that the appeal lacks merit and is hereby dismissed. Finally, the judgment of the High Court of Kenya at Garsen (R. Nyakundi, J.) dated 15th September 2021 in HCCRA No. 36 of 2019 is hereby upheld. It is so ordered.

DATED ANDDELIVERED ATMOMBASA THIS 8TH DAY OF NOVEMBER 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA Carb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

Deputy Registrar