Manyaa v Republic (Criminal Appeal 84 of 2019)
[2024] KECA 1835 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1835 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 84 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 20, 2024

BETWEEN

BONFACE MANYAA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kakamega (NJagi, J) dated 25th July 2018 in HCCRA No. 154 of 2014)

JUDGMENT

1. Bonface Manyaa, the appellant herein, was tried and convicted by the Chief Magistrate's Court at Kakamega of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the charge against him were that on 3rd November, 2012, at around 1.00 pm in Kakamega County, he unlawfully and intentionally inserted his genital organ namely penis into the genital organ, namely vagina, of BA (name withheld) a girl aged 10 years.

3. During the trial, the prosecution called five witnesses, including BA and her father DOM (name withheld). Upon considering the evidence, the trial magistrate found the appellant guilty, convicted him of the offence of defilement and sentenced him to life imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant lodged an appeal in the High Court. However, all the eleven grounds that were raised by the appellant in support of the appeal, addressed only the issue of conviction. Upon hearing the appeal, the learned Judge of the High Court found all the ingredients of the charge of defilement having been proved and the conviction proper. He therefore upheld the appellant's conviction and affirmed the sentence that was imposed by the trial magistrate.

5. The appellant is now before this Court in a second appeal, in which he has appealed against both conviction and sentence. In his grounds of appeal, he faults the learned Judge for failing to observe that he was not informed of his rights to representation, and was, therefore, substantially prejudiced; in failing to observe that he was not accorded a fair trial, as he was not provided with statements of the prosecution witnesses in contravention of Article 50(2)(j) of the Constitution; in failing to find that the mandatory sentence of life imprisonment has been declared unconstitutional; in failing to find that the appellant's conviction was based on insufficient, and contradictory evidence, and that the prosecution failed to prove their case to the required standard; in finding that the ingredients of the offence of defilement were proved; and in failing to consider the appellant's defence and alibi.

6. In support of the appeal, the appellant filed written submissions in which he contended that he was not informed of his right to representation when he appeared before the magistrate's court, and therefore, suffered substantial injustice as his rights under Article 50(2) of *the Constitution* were violated; that although he complained about not being provided with witness statements, the statements were never availed to him. Citing Makumbi Sub Wanyeso -vs- Republic [2023] eKLR, the appellant argued that the mandatory minimum sentence of life imprisonment imposed against him has since been declared unconstitutional.

7. In addition, the appellant added that the evidence adduced against him was inconsistent, inadequate, insufficient and had material discrepancies that weakened the prosecution case. The appellant gave an example of the contradiction in the alleged presence of blood stains on the underpants, when BA stated that her mother had washed the clothes. The appellant questioned why the other children who were said to have been present during the incident were not called to testify. He argued that the court was not told whether there was penetration, and if so, by what weapon, as the absence of a hymen alone did not prove penetration.

8. The respondent opposed the appeal through written submissions that were filed by C. Kagai, from the Office of the Director of Public Prosecution (ODPP). During the hearing of the appeal, the submissions were highlighted by learned counsel, Ms. Busienei, a Senior Prosecution Counsel. The respondent summarized the appellant's appeal into four main issues, which were, whether the rights of the appellant were breached and whether he was afforded a fair hearing; whether the conviction of life imprisonment is constitutional; whether the State proved its case beyond reasonable doubt; and whether the alibi raised was rebutted.

9. The respondent pointed out that the record of the trial court's proceedings, showed that the appellant informed the court that he was represented by an advocate, and that subsequently he informed the court that he was ready to proceed in person, and therefore, the issue of violation of his right to representation by counsel did not arise.

10. With regard to life imprisonment, the respondent citing Francis Karioko Muruatetu & another -vs- Republic, Petition No. 15 and 16 of 2015 [2021] KESC 31 (KLR), submitted that the Supreme Court's decision with regard to the mandatory sentence, only applied to offences of murder under section 203 and 204 of the Penal Code. She pointed out that the appellant took advantage of the victim who was only ten years, and that the court took into account the aggravating circumstances.

11. The respondent argued that there was clear flow of evidence among all the prosecution witnesses, and the contradictions, if any, were not fatal to the prosecution case; that the prosecution discharged its mandate of proving the case against the appellant beyond reasonable doubt and therefore displaced the appellant's alibi defence. The Court was urged to dismiss the appeal and affirm the sentence.

12. This being a second appeal, by dint of Section 361(1) of the Criminal Procedure Code, the mandate of the Court is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered, or failed to consider matters they should have considered, or looking at the entire decision, it is perverse. In the case of Kaingo vs Republic [1982] KLR 213, this Court asserted this position:

> "A second appeal must be confirmed 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. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did. See (Reuben Karoti S/O Karanja versus Republic [1956 17EACA 146]."

13. Having considered the record, the grounds of appeal, and the rival submissions that were made before us, and in light of this Court's mandate, as afore stated, the issues of law that we discern in this appeal are, first, whether the appellant's right to fair trial under section 50(2) of *the Constitution*, were breached; whether there was sufficient evidence to prove the charge against the appellant, to the required standard; whether the appellant's alibi defence was considered; and whether the sentence of life imprisonment that was imposed on the appellant was proper, and if so, whether there is justification for this Court to intervene.

14. The appellant having been charged with the offence of defilement, under section 8(1) as read with section 8(2), of the *Sexual Offences Act*, the prosecution had to establish three main ingredients. That is, that BA was aged was eleven years or less, at the time of the commission of the offence; that there was penetration of BA's genital organs by the genital organs of another person; and that the appellant was positively identified as the person who penetrated BA.

15. The circumstances leading to the appellant's arrest were briefly as follows: On the material day, BA was at home with her two younger sisters, while her parents were away. The appellant went to the home, and asked BA to accompany him, so that he could give her money for her father. BA accompanied the appellant, but while they were on the way, the appellant dragged BA into a sugarcane plantation, removed her underpants, ordered her to lie on the ground, then removed his trouser and put his penis into her vagina, threatening to stab BA if she cried. After he finished his mission, he told BA to go back home. BA went back home crying and reported the matter to a neighbor, Grace Mukasa (Grace). Grace noted that BA was bleeding on her private parts. Later, DOM came back home and was informed of what had transpired. He took BA to Makhunga hospital and also reported the matter at Makhunga Police Station. The police took possession of the clothes that BA was wearing. She was later examined by Patrick Mambili (Patrick), a Senior Clinical Officer, at Kakamega Provincial General Hospital (PGH), who filled the P3 form, indicating that BA had lacerations on her labia majora. Subsequently, Corporal Jacob Rotich (Cpl. Rotich) of Makhunga Police Patrol Base, who was the investigation officer, had the appellant arrested and charged. Cpl. Rotich also produced the exhibits including BA's birth certificate which showed she was born on 11th October, 2003.

16. In his defence, the appellant gave a sworn statement in which he stated that on the material day, he was nowhere near Eshisiru. He did not give his exact location, but stated that he had gone to plaster someone's house.

17. Although the appellant complained that his rights to a fair trial was violated, in that, he was not given statement of witnesses and was also not informed of his right to representation by counsel, it is apparent that the appellant did not raise any of these issues before the High Court, and, therefore, in its judgment, the High Court did not address the issue of breach of his right to fair trial. Without the

High Court's views on this issue, it is needless to say more on the issue, as it is not open to this Court to address it, there being nothing upon which this ground of appeal can be anchored.

18. Both BA and her father gave her age as ten years at the time of the incident. A birth certificate showing that BA was born on 10th October, 2003 was also produced in evidence. The evidence adduced was therefore sufficient to prove that the appellant was under eleven years old.

19. As regards penetration, it is defined under Section 2 of the *Sexual Offences Act* as "the partial or complete insertion of the genital organs of a person into the genital organs of another person." In this case BA gave credible evidence regarding how the appellant had removed her clothing, forced her to lie on the ground, removed his trouser and inserted his penis into her vagina. BA's evidence regarding penetration was consistent with the evidence of Grace who examined BA's private parts and noticed that there was blood in her vagina. The evidence was also consistent with that of Patrick who noted on the P3 form that BA had lacerations on her labia majora. The evidence before the Court was therefore sufficient to prove penetration.

20. As regards the identity of the person who caused the penetration, BA was categorical that it was the appellant. A person who was well known to her because he was a neighbour who often came to her place to buy vegetables or changaa. BA named the appellant as the perpetrator of the offence immediately she went back home and reported the matter to her neighbour Grace. The identification of the appellant by BA was clear, and therefore, this ingredient was also established.

21. From the above, it is evident that the ingredients of the offence were proved to the required standard and the appellant established to have committed the offence. The first appellate court properly reconsidered and re-evaluated the evidence and came to the correct conclusion. The appellant's conviction was, therefore, safe. His defence which had no substance, the details of the alleged alibi not having been given, was properly rejected.

22. On the issue of sentence, section 8(2) of the Sexual Offence Act under which the appellant was charged, provided the penalty for the offence as mandatory life imprisonment. We are aware that in Manyeso -vs- Republic, Criminal Appeal No. 12 of 2021 [2023] KECA 827 (KLR), the Court found that the indeterminate life sentence was inhuman and violated the right to dignity under Article 28 of *the Constitution*, and consequently held that the sentence of indeterminate life imprisonment is unconstitutional. In Ayako -vs- Republic, Criminal Appeal No. 22 of 2018 [2023] KECA 1563 (KLR), this Court took the matter further by declaring that life imprisonment does not mean the natural life of the convict and translated life imprisonment to thirty years' imprisonment.

23. However, the jurisprudence in the above trajectory, has since taken a different turn, following the Supreme Court's binding decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR), in which the Supreme Court addressing whether the courts had discretion to impose sentences below the minimum mandatory sentences prescribed in the *Sexual Offences Act*, asserted that:

> "Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction the singular sentence is already prescribed by law."

24. Regarding whether the Court of Appeal could consider the constitutionality or otherwise of such sentences, the Supreme Court gave directions in the same decision, R -vs- Mwangi (supra) as follows:

> " 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 sentence or mandatory sentence other than the offence of murder."

24. The appellant having been sentenced to the mandatory sentence of life imprisonment provided under section 8(2) of the Sexual Offences Act, the sentence is lawful as the trial magistrate had no option, but to impose that sentence. The issue of the constitutionality of the sentence of life imprisonment that was imposed upon the appellant, not having been raised in the High Court, it is not open for consideration by this Court. Consequently, there is no reason for this Court to interfere with the sentence.

24. The upshot of the above is that, this appeal totally fails. It is dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2024 HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR