Gona v Republic (Criminal Appeal E004 of 2023)
[2024] KECA 1757 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KECA 1757 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E004 OF 2023

MSA MAKHANDIA & AK MURGOR, JJA

DECEMBER 6, 2024

BETWEEN

CHARO KENGA GONA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 30th December 2021 in Criminal Appeal No. 8B of 2017)

JUDGMENT

1. Four grounds of appeal were raised by Charo Kenga Gona ("the appellant"), in this second and perhaps last appeal before this Court to wit, whether: the prosecution proved its case to the required standard, the contradictions and inconsistencies in the prosecution evidence undermined the prosecution case; the two courts below considered the appellant's defence based on the alleged bad blood between him and the members of the victims family; and finally, whether the sentence imposed was manifestly harsh, excessive and unconstitutional.

2. Being a second appeal, our mandate by dint of the provisions of section 361 of the Criminal Procedure Code, is that we are enjoined to consider only matters of law. Several decisions of this Court have expounded on this provision. They are to the effect that this Court cannot interfere with the decision of the first appellate 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 a matter of law. See Karani vs. Republic [2010] 1 KLR 73. We also consider ourselves bound by the concurrent findings of fact arrived by the two courts below, unless shown to be based on no evidence. See Njoroge vs. Republic [1982] KLR 388 .

3. Before delving into the other grounds of appeal, we wish from the onset to deal with the issue of sentence following the recent developments in the area. The Supreme Court in Republic vs. Joshua Gichuki Mwangi - Petition No. E018 of 2023 (UR), had this to say regarding the jurisdiction of this Court when dealing with sentences in a second appeal:

> "The Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction.
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> We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed."

4. Going by the aforesaid injunction, the appeal on sentence by the appellant will be a no-go zone for us.

5. It is necessary before dealing with the remaining grounds of appeal that we revisit the evidence availed to the trial court by the prosecution albeit in an abridged fashion. The appeal emanates from the judgment of Nyakundi, J. delivered on 30th December 2021 in the High Court at Malindi in Criminal Appeal No. 8B of 2017. The appeal had been proffered by the appellant against the conviction and sentence of the Senior Principal Magistrate's Court at Kilifi (R. K. Ondieki, SPM) dated 22nd February 2017. The appellant was found guilty on the main count of defilement contrary to section 8 (1) of the *Sexual Offences Act*. The particulars of the offence were that on 21st July 2013 at Bamba location, Ganze Sub-County in Kilifi County the appellant intentionally and unlawfully inserted his genital organ, namely the penis into the genital organ, namely the vagina of DKK a minor aged 9 years. The appellant entered a plea of not guilty and his trial ensued in earnest.

6. The prosecution's case was anchored on the evidence of five prosecution witnesses. The complainant, DKK was aged nine at the time, when on 21st July 2013 she was sent by her grandmother to the posho mill to grind maize. She was in the company of AK and R. At the posho mill, she met the appellant who after grinding the maize gave her Kshs. 50.00 to buy doughnuts at a nearby shop. When she came back, the appellant asked AK and R to wait outside as he ushered DKK into the posho mill again. The appellant then undressed DKK and penetrated her vagina using his penis. DKK screamed in pain and was joined by AK and R but nobody came to their aid. Having satisfied his urges, the appellant released the trio with a warning that they she should not tell anybody what had transpired otherwise they would be in big trouble. She walked out holding her pants in her hands and both AK and R noticed that she was bleeding from her private parts. Immediately they arrived home, DKK informed her grandmother

about the incident. The matter was then referred to Bamba Police Station who subsequently issued DKK with a P3 Form and Post Rape Care “PRC” Forms.

7. PW2, Dr. Daisy Juma of Kilifi District Hospital was meant to produce the P3 form as well as the medical report prepared by Dr. Busra, but was stood down. She subsequently was unable to testify.

8. PW3, AK’s evidence merely corroborated that of DKK in material particulars.

9. PW4, PC Stanley Maritim of Bamba Police Station received a report of the incident and commenced investigations. He issued P3 form “PRC” Forms to DKK. The medical examination conducted by Dr. Busra a medical doctor attached to Kilifi Hospital confirmed that her hymen was ruptured, which was evidence of defilement. Her evidence was, however, tendered by PW5, Dr. Sheila Mukali as she was unavailable. PW4 also sought and obtained DKK's birth certificate. Following the completion of investigations, the appellant was traced, arrested and charged with the offences aforestated.

10. At the close of the prosecution case, the appellant was found with a case to answer and was placed on his defence. In his unsworn statement, the appellant denied any encounter with DKK on the material day or committing the offence. All that he could recall was that on a date he could not remember in the year 2014, he was arrested from his house during the wee hours of the morning and taken to Bamba Police Station and was later charged for an offence he did not commit.

11. At the conclusion of the trial, the trial court found that the victim’s age was proved by PW4 who produced a birth certificate to show that the victim was indeed 9 years old at the time of the incident; that there was no evidence of any other person in the posho mill apart from the appellant and therefore he was placed at the scene of crime and finally, the trial court was persuaded that penetration had been established. Based on the foregoing, the trial court on 22nd February 2017, concluded that the prosecution proved its case beyond reasonable doubt and convicted the appellant. Upon conviction, the appellant was sentenced to life imprisonment.

12. His first appeal to the High Court was dismissed on 30th December 2021. The High Court was satisfied that: there was sufficient evidence that penetrative sex took place between the appellant and DKK; the appellant was positively recognized and placed at the scene of crime by DKK and A; and DKK’s wounds in her private parts were occasioned by sexual assault of DKK by the appellant which evidence was corroborated by the medical report tendered by PW5. Given the compelling evidence and the victim’s tender age, the High Court found no reason to interfere with the conviction and sentence.

13. The appellant filed this second appeal to this Court as already stated on the grounds already set out at the beginning of this judgment. The appellant filed undated written submissions in support of the appeal. His submissions merely reiterated and expounded on the grounds of appeal and we need not rehash them.

14. In response, the respondent through Ms. Kanyuira, learned Senior Prosecution Counsel submitted that the prosecution contrary to the submissions of the appellant, had proved its case to the required standard. The prosecution proved that DKK was a child through her own evidence, which was buttressed by the production of the birth certificate. There was therefore no doubt in the minds of the trial court as well as the first appellate court as to the age of DKK.

15. On penetration, counsel submitted that penetration under Section 2 of *Sexual Offences Act*, it is defined as “the partial or complete insertion of the genital organs of a person into the genital organs of another person.” That there was sufficient evidence by DKK and PW5 that there was penetrative sex between the appellant and DKK. In any case, this was a concurrent finding of the two courts below which this Court should uphold. DKK and AK identified the appellant as they frequented the posho mill and even knew him by name, Charo. There was no doubt in the minds of these two witnesses as to who

defiled DKK, therefore, the element of identification of the appellant was proved beyond reasonable doubt. Counsel submitted that though the appellant alleged that he was in the dark as to the charges he was facing, this statement was only made after he was placed on his defence. That it was apparent from the cross-examination conducted by the appellant on the prosecution witnesses that he was aware of the charges he was facing as his questions were directed towards the defence of defilement. It was therefore not true that the appellant was not aware of the charges he was facing. Counsel concluded her submissions by stating that the conviction of the appellant was safe and the sentence legal and fair and should not be interfered with.

16. On the issue of bad blood between the appellant and members of DKK's family, counsel submitted that neither was this issue brought out during the cross-examination of any of the witnesses. He also did not raise it in his defence. This is an issue that the appellant was raising for the first time in this appeal and therefore he cannot allege that it was never considered.

17. In our view, the determination of this appeal turns on whether the offence was proved and whether the appellant's defence was given due consideration by the two courts below. Starting with the latter, we note that the appellant advanced the defence of alibi. That he was never with DKK on the day of the alleged commission of the offence. An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in law assume any burden of proving it, and it is sufficient, if an alibi introduces into the mind of a court a doubt that is not unreasonable. See Kiarie vs. R [1984] KLR. The appellant's defence was in our view, however, displaced by the strong prosecution evidence that placed him at the scene of crime. Both DKK and AK knew the appellant very well. Indeed, they all confirmed that the appellant's home was not very far from theirs. So, he was a person well known to them. They even fondly referred to him as "Charo" and testified as to what he did to DKK. They would have had no reason at all to place him at the scene of crime.

18. The appellant having been placed at the scene of crime by these two credible witnesses, his alibi defence could not hold. Still on the question of the appellant's defence and particularly on the issue of bad blood between him and members of DKK's family, we would agree with the learned Prosecution Counsel that the issue is being raised for the first time in this appeal and therefore does deserve our interrogation.

19. The appellant was recognized at the scene of crime. We have been told time without number that recognition is most assuring as opposed to identification of a stranger in difficult circumstances. That recognition is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another. See Anjononi & 2 Others vs. Republic [1980] eKLR. That settles the question as to whether the appellant was the perpetrator of the offence.

20. Penetration was proved by the evidence of DKK who came from the appellant's posho mill bleeding from her private parts. Similarly, PW2 witnessed the bleeding. To crown it all the evidence of PW5 was categorical that DKK had been defiled given the raptured hymen.

21. Lastly, the age of DKK was proved by the production of her birth certificate by PW4.

22. We are therefore satisfied just like the two courts below that all the ingredients of the offence were proved. Indeed, those courts made concurrent findings on the said issues and we have absolutely no reason to fault them. We therefore, find the appeal against conviction devoid of merit, and the same is hereby dismissed.

23. This judgment is delivered pursuant to rule 34 (3) of this Court's Rules, 2022 as Odunga, J.A declined to sign.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar