SCM v Republic (Criminal Appeal 17 of 2019)
[2023] KECA 9 (KLR) (20 January 2023) (Judgment)

Neutral citation: [2023] KECA 9 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 17 OF 2019

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

JANUARY 20, 2023

BETWEEN

SCM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi delivered by Hon W. Korir, J. on 27th September 2018inHigh Court Criminal Appeal No. 36 of 2017 Original Malindi CMC Criminal Case SO 351 of 2015)

JUDGMENT

1. This a second appeal that was lodged herein by the appellant who is in person, against the judgment delivered on 27th September 2018 by the High Court at Malindi (Hon. W. Korir, J.) in Criminal Appeal No. 36 of 2017. The Appellant had on 29th June 2015 been charged before the Chief Magistrates court at Malindi with one count of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* (hereinafter SOA). He faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *SOA*.

2. The appellant pleaded not guilty to the charges. The prosecution called four witnesses and not five as the trial court record shows. We note from the judgment of the High Court that the Judge dealt with the discrepancy in numbering of witnesses by virtue of the case having by started by one Magistrate and concluded by another.

3. The facts of the prosecution case were that on the 5th May 2014, the victim, PW2 was playing outside their home with other children including Marion and Sophia, both who were not called as witnesses, when her neighbor, the appellant in this case called her. PW2 was three months to her 10th birthday at the time. The appellant took her behind his house, removed his clothing, ordered her to remove hers

and then defiled her. PW2 described in graphic language exactly what the appellant did to her. She was then threatened with death if she informed anyone about the incident.

4. PW3, LK, the mother of the victim told the court that she was informed about the sexual assault on 12th July 2014. According to her, Mama M whose daughter was also defiled informed her that the defilement had taken place over a period of time. PW3 testified that when she questionedPW2 on the evening of the 12th July 2014, she declined to say anything and merely cried. On the second day she asked her about the issue, PW2 talked and said that the appellant had called her and caressed her breasts. PW3 reported the matter at Watamu Police Station. Thereafter PW2 was treated and examined at Gede Dispensary. The examination was carried out by PW5 a Clinician, on the 26th July 2014. It revealed that the victim had been defiled, and that she had bruises on the vaginal wall and a broken hymen. She was also found to have been infected with HIV+. At the time of examination, the victim was 10 years old.

5. PW4 was the investigating officer of the case. Her evidence was that she visited the scene of incident upon receipt of the report on the 13th July 2014, to investigate two cases against the appellant mounted by PW2 and another child victim. She testified that she interviewed PW2 and other witnesses. She testified that at the scene of crime she learnt that the appellant ran away from the area. PW4 was called by PW3 on 26th June 2016, one year after the report was made to the police, and informed that the appellant had returned to the area. She arrested the appellant and preferred the charges against him.

6. The appellant was placed on his defence and he gave a sworn statement. He told court that he was arrested on 5th July, 2014 and charged on 28th July, 2015. He admitted that he knew PW2 as a neighbor but denied committing the offence. He stated that before the date of alleged offence, there was a disagreement between him and the complainant over a phone, where he demanded that the complainant buys him a new phone. He said that he held discussions with the complainant over his phone and they agreed that she should compensate with an amount of Kshs. 5000/=. That he was paid 1500/= with the balance of 3500/= to follow later. That he thought the matter was over and he returned to work. He said that he was framed with the offence.

7. In her judgement delivered on 3rd November, 2017 the learned trial magistrate Hon. Khatambi was satisfied that there was evidence that PW2 was aged 9 years as at the time of the sexual encounter as per the birth certificate; that she was sexually assaulted as evidenced by the P3 form, the treatments notes and also by her testimony. The court was satisfied that the appellant was properly identified as the assailant being well known to the victim as her neighbor.

   The learned trial Magistrate believed the evidence of PW2, the child victim, that she was telling the truth. The court found the appellant's defence was an afterthought. The appellant was convicted of the main charge. In a ruling delivered on the 20th November, 2017 the learned trial Magistrate sentenced the appellant to serve life imprisonment.

8. The appellant was dissatisfied with the decision of the learned Magistrate and filed a first appeal to the High Court at Malindi. The grounds of appeal were that the prosecution did not prove its case; that the sentence meted on him was unjustified and that his defense was not considered. The High Court considered his appeal and, in a judgment, delivered (by Hon. W. Korir, J. as he then was) on 27th September 2018, the appellant's appeal was dismissed in its entirety. The learned Judge of the High Court found that the age of PW2 was undisputed; that the P3 form and the observation by PW3 pointed towards the fact that PW2 was sexually assaulted, and that the appellant was identified as a neighbor to PW2 and PW3. The court also found that the appellant's defence was correctly regarded as an afterthought and properly rejected. It was concluded that the appellant's conviction was safe and the sentence correct and well within the law.

9. The appellant was dissatisfied with the decision of the High Court and filed a second appeal to this Court by a Notice of Appeal dated 18th February 2019. The grounds of this second appeal are four. One that learned Judge erred in law and fact in upholding his conviction failing to consider that the case was poorly investigated; two, that the High Court Judge erred in law for failing to consider that was massive contradictions in the prosecution case; three, that the High Court Judge erred in law by failing to consider that the prosecution side failed to prove its case beyond reasonable doubt; and, four that the High Court Judge erred in law by failing to consider the appellant's defence. In an apparent shift from these grounds of appeal, the appellant raised three new grounds in his written submissions which focused on inadequacy of medical evidence and the harshness of a provision of mandatory sentence.

10. We heard the appeal virtually on the 28th September 2022. The appellant appeared in person and relied on written submissions which had earlier been filed on his behalf through the prison where he was being held. Mr. Alex Gituma, learned Principal Prosecution Counsel relied on his written submissions dated 28th January 2022 in opposition to the appeal.

11. We have considered the appeal, submissions by both the appellant and the State as well as the cases relied upon. This is a second appeal and all we can consider are matters of law by dint of Section 361(1) of the *Criminal Procedure Code*. We cannot interfere with the decision of the courts below 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." See Karani vs. R [2010] 1 KLR 73."

12. The appellant relied on his written submissions which merged the four grounds of appeal into two. While placing reliance on the case of *Ben Maina Mwangi v. Republic*, NAI High Court Criminal Appeal No. 471 of 2001, the appellant challenged his conviction on the grounds that the medical evidence adduced by the prosecution was insufficient and unreliable, having been obtained after the victim had been treated; and that the medical notes did not indicate that the victim had injuries. He urged that the victim could have had the injuries in her genitals from other causes including exercise and bicycle riding. On the issue of his defence, the appellant contended that it was not considered.

13. Mr. Alex Gituma, Principal Prosecution Counsel started by urging the Court to resist delving into grounds of appeal based on facts, citing the cases of *Karani v. Republic*, [2010] eKLR and *M'riungi v. Republic* [1983] KLR 455. In answer to grounds 1, 2 and 3 of the ones the appellant had initially filed, learned Prosecution Counsel refuted that the prosecution case was not proved to the required standard, or that there were contradictions in the prosecution case on grounds the age of the victim was proven vide the birth certificate. He urged that the medical evidence proved penetration had taken place. He also urged that the identity of the appellant was proven without a doubt. On the issue of the appellant's defence, learned Prosecution Counsel urged that the appellant's defence was considered and found to be weak both by the trial court and in the High Court. He urged that the learned High Court Judge found that the defence had been correctly rejected.

14. We have perused the judgment of the learned High Court Judge and note that he went into great depth to examine the evidence that was adduced before the trial Court. In regards to the challenge on the medical evidence and injuries found on the complainant victim, the Judge observed:

> " As to whether the complainant was penetrated, she clearly narrated how the Appellant called her before proceeding to defile her...This is the narrative she later gave her mother and the investigating officer.
>
> When the complainant was taken for medical examination on 14thJuly, 2014, the person who checked her observed that there were bruises on the vaginal wall and there was no hymen. The same observation was made by PW5 when he filled the P3 form.
>
> The evidence taken in its entirety points to the fact that the complainant was sexually assaulted. The perpetrator was clearly identified by the complainant and her mother. Indeed, the Appellant admitted that the complainant was his neighbor."

15. The first issue is whether the offence was proved to the required standard. In that regard, it is established that "this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence." See *Karingo vs. Republic* (1982) KLR 213. There are, in this case concurrent findings by the two courts below with which we concur that all the ingredients of the offence of defilement were proved beyond reasonable doubt. The two courts below concurred that the medical evidence adduced proved that there was penetration of the complainant with bruises suffered as a consequence of that penetration. There was also concurrence, with which we agree that the appellant was properly identified as the perpetrator of the offence, and that his defence was properly rejected for being an afterthought. As demonstrated above, there was overwhelming evidence to support the decision of the two courts below and there are no grounds on which this Court can lawfully interfere with those findings.

16. The appellant relied on this Court's decision in *Eliud Waweru Wambui v. Republic* Criminal Appeal No. 201 of 2016, and challenged the sentence imposed by the trial Court and confirmed by the High Court. It was his contention that as the judges in the cited case observed, the strict adherence and imposition of some of the sentences prescribed under the SOA resulted to purveyance of harm, prejudice and injustice. He urged us to find that enforcing the sentences under the SOA as recommended would result in total disregard to all notions of rationality and proportionality. It was pointed out that the mitigation recorded by the Trial Magistrate was of no value; that mercifully in the case of *Evans Wanjala Wanyonyi v R* (2019) eKLR, the 20 years mandatory sentence was substituted. He sought an appropriate sentence and consideration of the time spent in custody. As we stated earlier, this was not a ground in the initial grounds of appeal filed and as a result Mr. Gituma did not respond to it in his submissions.

17. As for the sentence, under Section 361(1)(a) of the *Criminal Procedure Code*, severity of sentence is a matter of fact outside the scope of a second appeal such as this. Furthermore, the Supreme Court of Kenya in its Directions in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others* (*Amicus Curiae*) [2021] eKLR has since pronounced that its earlier decision in the same case "did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute" and that its previous decision "cannot be authority for stating that all provisions of law prescribing

> " mandatory or minimum sentences are inconsistent with the Constitution."

18. As such, the appellant's arguments in regard to the harshness of sentences under the SOA does not aid him. This Court can only interfere with sentence if it is illegal. A person convicted of defilement under Section 8 (1) as read with Section 8 (2) of the *SOA* is liable to life imprisonment. The appellant was sentenced to life imprisonment and there is no suggestion that it is an illegal sentence. We have no basis therefore for interfering with the sentence passed by the trial court and affirmed by the High Court.

19. The result of this appeal is that the same fails and is dismissed.

DATED AND DELIVERED AT MALINDI THIS 20TH DAY OF JANUARY, 2023.

S. GATEMBU KAIRU

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FCIArb JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR