Bushira v Republic (Criminal Appeal 134 of 2016)
[2023] KECA 164 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 164 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 134 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

FEBRUARY 17, 2023

BETWEEN

MARK MUSONYE BUSHIRA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kakamega (Dulu, J.) dated 4th March, 2015 in HCCRA No. 90 of 2012)

JUDGMENT

1. The appellant was charged with defilement of a girl contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence are that on diverse dates between 15th and July 17, 2009 at [particulars withheld] village, [particulars withheld] sub-location, [particulars withheld] location in East Kakamega district within the former Western province, he unlawfully and intentionally inserted his genital organ namely penis into the genital organ namely vagina of U (minor), a girl aged 14 years.

2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

3. The appellant denied the charges leading to a trial in which the prosecution called four witnesses in support of its case. The minor testified as PW1 and narrated that on July 15, 2009 while on her way to her aunt's place at 6pm, she realized that the appellant was following her. When she reached her aunt's gate, the appellant held her left hand and slapped her hard on her face. The minor explained that she wanted to cry but the appellant removed a knife from his pocket, placed it on her neck and told her that if she refused to go with him to his house, or if she screamed, he would kill her. The appellant then dragged her onto a path and led her to his house where he locked her up for two days and defiled her

repeatedly. On the second day, he opened the door whereupon the minor met her father (PW2), her brother and a crowd of other people outside.

4. PW2, the father to the minor testified that on the material day his daughter went to school but she never came back home. He searched for her but he could not find her. He thus reported the minor's disappearance to the village elder, the sub-chief and the chief. PW2 stated that on July 17, 2009 he was informed by a motor cycle/bicycle 'boda boda' cyclist that there was a man who worked in a nearby hotel and who had a habit of raping girls after using threats of violence on them. The cyclist together with four other cyclists took PW2 to the appellant's house where they found the appellant at the door of the house holding a machete or 'panga'. PW2 also found the minor at the house. The appellant was apprehended by the cyclists who took him to Kakamega police station in the company of PW2, his wife and the minor. At the police station PW2 was given a P3 form which was filled at Kakamega provincial hospital upon the minor being examined. PW2 indicated that the minor was born on October 12, 1995 and hence she was around 14 to 15 years old at the time. He produced the minor's dedication card to corroborate that fact.

5. PW3, a clinical officer at the Kakamega provincial hospital, testified that when the minor visited the hospital, she looked sickly. Both of her eyes had a swelling and upon examination of her private parts, she had a swollen labia minora and discharge from her vagina. She also had difficulty walking. PW3 produced the P3 form which had been filled by his colleague clinical officer who had been transferred at the time, and whose attendance of the hearing the court found could not be obtained without undue delay and expense.

6. PW3 also produced the post rape form and patient record book which were issued by the same hospital.

7. PW4, the investigating officer gave testimony to the effect that on July 17, 2009 while at the police station, he received a report of defilement of a minor, which he recorded in the occurrence book (OB) and issued the complainant with a P3 form to be filled at the hospital. At the close of the prosecution case, the learned senior resident magistrate found that the appellant had a case to answer and placed him on his defence. The appellant gave an unsworn statement and denied defiling the minor. He claimed that on July 16, 2009 he was at his place of work when he was arrested and taken to Kakamega police station. He was later charged before court. The appellant had indicated that he would call one witness but the witness failed to show up.

8. The trial magistrate evaluated the evidence tendered before the court and found the appellant guilty as charged and sentenced him to 20 years imprisonment.

9. Aggrieved by the conviction and sentence, the appellant appealed to the High Court on 7 grounds. Dulu, J re-evaluated the evidence on the record and in a judgment dated March 4, 2015 dismissed the appeal in its entirety. The learned judge upheld both the conviction and sentence meted on the appellant by the trial court.

10. Still aggrieved, the appellant preferred the instant appeal based on 3 grounds, which we summarize as that the judge erred in law by;

    a. Failing to observe that article 50(2) (c) and (j) of the *Constitution* were grossly infringed.

    b. Being misdirected by evidence which was contradictory and lacked merit.

    c. Relying on evidence which was not well investigated.

11. During the hearing of the appeal, the appellant appeared in person while the respondent was represented by Ms Vitsengwa, the learned prosecution counsel. Both parties sought to rely on their filed written submissions, with the appellant urging us to reduce his sentence.

12. He argued that the prosecution breached the provisions of article 50 (2) (c) and (j) of the *Constitution* by failing to provide him with the evidence they sought to rely on in advance before trial. He submitted that the evidence of defilement by the prosecution witnesses was contradictory and hence insufficient to warrant a conviction. For instance, the appellant contended, whereas the minor stated that she was abducted while on her way to her aunt's place, PW2 stated that she was on her way from school, and PW4 testified that she was on her way from her aunt's place. Further, whereas the minor had indicated that she saw many people on the road on her way to her aunt's place, in another part of her testimony she stated that they did not meet anyone. The appellant complained that while PW3 testified that he received a report that the minor was abducted by two people, the minor's evidence was that she was abducted by the appellant only.

13. The appellant faulted the trial court for relying on evidence that had not been investigated, pointing out that material exhibits like the knife used to threaten the minor, were not produced. He further contended that failure of the clinical officer to fill some sections of the P3 form was an indication that there was no solid evidence of recent penetration. In the end he urged us to quash the conviction, set aside the sentence and set him at liberty.

14. For the respondent, Ms Vitsengwa opposed the appellant's reliance on article 50(2) (c) and (j) arguing that the current *Constitution* having come into effect on August 24, 2010, it was not applicable when the hearing of this matter started at the trial court on July 21, 2009. At the time, the existing position was article 77(1) (d-f) of the old *Constitution*, and specifically article 77(1) (d) which provided that an accused person was permitted to defend himself before the court in person or by a legal representative of his own choice. As such, counsel contended, the appellant had an option of either representing himself or taking up counsel and there was no burden placed upon the court to inform him of this right. Moreover, the appellant actively participated in the trial and even cross- examined the prosecution witnesses.

15. On the allegation that the court relied on contradictory evidence that lacked credence, Ms Vitsengwa asserted that the 3 elements of defilement namely, the age of the minor, penetration and identity of the perpetrator, were proved. With respect to the claim of contradictory evidence, she cited this court's decision in *Richard Munene v Republic* [2018] eKLR where the court stated;

> "It is however, not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to a case."

16. Counsel further observed that the appellant had not disputed that the minor had been found at his home. Rather, he wished the court to believe that someone else had taken the minor to his home. If that was the case, counsel questioned why the appellant had stayed with the minor for two days without taking any action to protect her. As to the claim that the case was not investigated, Ms Vitsengwa placed reliance on the testimony of the investigating officer and maintained that the matter was investigated. In conclusion, we were urged to dismiss the appeal and uphold the sentence.

17. This being a second appeal, the court restricts itself to consideration of questions of law only by dint of section 361(1) (a) of the *Criminal Procedure Code*. This was affirmed by the holding of this court in *David Njoroge Macharia v Republic* [2011] eKLR;

> "That being so only matters of law fall for consideration–see section 361 of the *Criminal Procedure Code*. As this court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below

are shown demonstrably to have acted on wrong principles in making the findings - see *Chemagong v R* [1984] KLR 611."

18. The appellant's grounds of appeal in the main complained about the severity of the sentence; his right to fair trial being violated by the prosecution failing to provide him with the evidence they sought to rely on before trial; and the prosecution evidence being contradictory and lacking credence.

19. On the ground of severity of sentence, we associate ourselves with the holding of this court in *P (not his real name) v Republic* (Criminal Appeal 106 of 2019) [2021] KECA 357 (KLR) (17 December 2021) (judgment);

> "As regards the appeal against sentence, under section 361(1) of the *Criminal Procedure Code*, this court's jurisdiction is limited to considering an appeal on matters of law only, and severity of sentence is a matter of fact, not law..."

20. We are also not persuaded that the appellant's right to fair trial was infringed in the manner he suggests. The record shows that the appellant actively participated in the trial, and there is no indication that the prosecution failed to furnish him with its evidence in advance. If indeed that happened, the appellant has not demonstrated that he asked for that evidence or raised the issue with the trial court and no action was taken. The claim that the prosecution evidence was contradictory and lacked credence is equally found to be without merit. We think the inconsistencies that the appellant cited are minor and do not affect the substance of the prosecution case.

21. We take cognizance of the appellant's mitigation that he has siblings who rely on him. However, considering the circumstances under which the offence was committed, where the appellant slapped the minor on her face, brandished a knife and threatened to kill her, and locked her up in his house for two days while defiling her, we are of the view that the aggravating factors of this matter far outweigh the mitigating factors. In the end, we find that the appellant was properly convicted of the offence of defilement as charged.

22. As a result, we find the appeal to be devoid of merit and we dismiss it in its entirety.

    Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF FEBRUARY, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR