Juma v Republic (Criminal Appeal 97 of 2017)
[2023] KECA 40 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 40 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 97 OF 2017

PO KIAGE, M NGUGI & F TUIYOTT, JJA

FEBRUARY 3, 2023

BETWEEN

SIMON JUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Kakamega (C. Kariuki, J.) dated 4th May, 2017 in HCCRA NO. 150 OF 2011)

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 November 13, 2009 in Kakamega North District within the Western Province, he unlawfully inserted his genital organ namely, a penis to the genital organ of NS (minor), a girl aged 15 years.

2. In the alternative, the prosecution preferred against him a charge of 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 4 witnesses in support of its case. The minor testified as PW1 and narrated that on the fateful day, she had escorted one Beatrice to a friend's house but Beatrice abandoned her. She then met the appellant who took her to his house. The minor explained that the appellant held her and threw her into his house where he removed her clothes and inner pant and defiled her 3 times until she fainted. She stated that the appellant locked her inside his house for 3 days, and on the fourth day he opened the door and told her to wash her blood-stained clothes. The minor stayed with the appellant for 2 weeks during which period he defiled her daily.

4. PW2, the mother of the minor, testified that the minor disappeared from home on November 13, 2019. They tried looking for her in vain but on November 29, 2019, she received a phone call that her

daughter had been found. Her husband, PW3, found the minor at the appellant's house upon which he reported the incident to the Assistant Chief. At the time the minor was in standard 6 and she was aged 14years, having been born in 1994. PW2 also produced the birth certificate of the minor. PW4, of Malava hospital testified that when the minor was taken to the hospital for examination, observed that she was not a virgin and on her vagina were bruises. She was tested for HIV and pregnancy and both tests were negative. PW4 produced the P3 form which he had signed.

5. 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 defense. The appellant gave an unsworn statement and called 2 witnesses. He claimed that the minor had agreed to get married to him and on November 13, 2019 she called and asked him to pick her from school. The appellant went and picked her and took her to his home where they stayed as husband and wife. DW2, the appellant's brother, testified that when he visited the appellant's home on the material day, he met him with the minor. The minor told him that she had decided to be "the appellant's woman" DW3, a businessman, also gave testimony to the effect that on the said date, he saw the appellant enter his house with a certain girl and when he asked him who she was, he said she was a wife that he had married.

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

7. Aggrieved by the conviction and sentence, the appellant appealed to the High Court on 10 grounds. Kariuki, J. re-evaluated the evidence on the record and delivered judgment on May 4, 2017 dismissing the appeal in its entirety.

8. Still aggrieved, the appellant preferred the instant appeal based on 5 grounds, which we summarize as that the judge erred in law by;

    a. Failing to find that the trial was unfair in terms of articles 50(2)(g),(h) and (j) of the *Constitution*.

    b. Failing to consider that the victim misled the appellant into believing that she was an adult.

    c. Failing to consider that the evidence of PW2 and PW3 was ambiguous and not in reference to any known complaint.

    d. Placing reliance on the evidence of PW4 whose competence was not disclosed by evidence as required under section 48 of the *Evidence Act*.

    e. Finding the charge proved in the absence of any evidence by the investigating officer.

9. During the hearing of the appeal, the appellant appeared in person while the respondent was represented by Ms Vitsengwa, the learned Prosecution Counsel. The appellant relied on his written submissions filed in court save to mention that he was a prison trustee who had reformed, having been in custody for 12 years.

10. The appellant's submission were that the prosecution case was riddled with inconsistencies which the court should not have relied on. For instance, the appellant contended, although the minor had stated that she was 16 years old, her mother PW2 stated that she was 14 years old. He asserted that the birth certificate for the minor produced in evidence was fabricated. The appellant further relied on section 8(5) of the *Sexual Offences Act* which makes it a defence to a charge of defilement, where the accused person can prove that he was deceived by the victim that she was over the age of 18 years at the time, and he believed so. The appellant argued that his relationship with the minor was well known by their relatives, and he was not aware that she was still in school, in essence justifying the defence under section 8(5.

11. The appellant faulted the respondent and the trial judge for failing to call the arresting officer and the investigating officer, witnesses who, according to him, would have shed more light on the matter. In support of this contention, the appellant relied on *Bukenya & Another Vs Uganda*[1972] EA 549.

12. Opposing the appeal, Ms Vitsengwa submitted that the prosecution had sufficiently proved that the minor was aged 15 years at the time of the offence in 2009, and at the time of giving testimony in 2010, she was 16 years. This position was affirmed by the minor herself and her mother who testified that she was born in 1994. On the claim that the prosecution failed to call crucial witnesses namely, the arresting officer and the investigating officer, counsel asserted that the witnesses called by the prosecution gave adequate evidence to prove the charges against the appellant. Moreover, section 124 of the *Evidence Act* allows a trial court to convict on the evidence of the complainant so long as the reasons for believing that evidence are recorded. The decision in *Bernard Kebiba Vs Republic* [2000] eKLR was cited for this proposition.

13. Ms Vitsengwa submitted that there was no doubt as to the identity of the appellant, as he had lived with the minor for a number of days when the offence was committed. Concerning the defence that the appellant believed the complainant was an adult pursuant to section 8(5) of the *Sexual Offences Act*, counsel rejected that assertion, reasoning that the appellant knew that the complainant was a student. Further, he did not demonstrate having bothered to ask the age of the complainant before engaging in the acts constituting the offence. In the end counsel urged that the appeal was unmeritorious and should be dismissed.

14. 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 Vs 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."

15. The appellant's grounds of appeal in the main complained about the trial being unfair as regards articles 50(2)(g), (h) and (j) of the *Constitution*, failure of the learned judge to find that the victim misled the appellant into believing that she was an adult, and reliance on the evidence of PW4 whose competence was not disclosed.

16. Concerning the claim of unfair trial, the appellant relies on the following provisions of article 50 of the *Constitution*:

> " (2) Every accused person has the right to a fair trial, which includes the right:
>
> g. to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"

17. In effect the appellant's claim is that he was not given an advocate to represent him in the trial, and he was also not provided with the prosecution evidence in advance. It is noteworthy that the appellant never raised the foregoing issues with the trial court. He did not ask for counsel and neither is there indication on record that the prosecution failed to supply him with the evidence it sought to rely on. In any case the record shows that the appellant had ample opportunity, which he seized, to cross-examine each of the prosecution witnesses. We are therefore not convinced that the appellant's rights to a fair trial were infringed in the way that he alleges.

18. Next is the contention that the learned judge failed to find that the complainant had misled him to believe that she was an adult. The learned judge upon evaluating this issue surmised;

> "There was no evidence at all adduced by the defence to demonstrate that the appellant was misled that PW1 was of age. His evidence was that he married her while he knew she was a student. He did not even inquire her age. She was a standard six pupil."

19. Upon review of the record, we concur with the reasoning of the learned Judge and find no merit in the appellant's claim. The argument that the trial court relied on the evidence of PW4 without noting his competence is also found deficient, for the reason that the appellant cross-examined him but never questioned his competence. In any event, by the appellant's own admission, penetrative intercourse with the minor obviously took place as he took the complainant to his house and they stayed there as "husband and wife". PW4 was therefore merely corroborating the incidence of defilement through his evidence.

20. In the end, we find that the appellant was properly convicted of the offence of defilement as charged.Accordingly, the appeal is devoid of merit and we dismiss it in its entirety.

Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 3RD 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