Masinde v Republic (Criminal Appeal 332 of 2019)
[2023] KECA 361 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 361 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 332 OF 2019

F SICHALE, LA ACHODE & WK KORIR, JJA

MARCH 31, 2023

BETWEEN

ELIUD SIMIYU MASINDE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma, (Riechi J), dated 31st October 2018) IN HC. CRA NO. 6 OF 2015)

JUDGMENT

1 Eliud Simiyu Masinde (the appellant herein), has preferred this second appeal against the judgment of Riechi, J dated October 31, 2018, in which he had initially been charged at the Senior Resident Magistrate's court in Kimilili with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No 3 of 2006.

2 The particulars of the offence were that between July 14, 2013 and July 16, 2013, at (particulars withheld), he intentionally caused his penis to penetrate the vagina of FN a child aged 15 years old.

3 In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to the provisions of section 11 (1) of the same Act. The particulars of the offence were that at the same time and place, he intentionally touched the vagina of FN a child aged 15 years.

4 The appellant denied the charge after which a trial ensued. In a judgment delivered on January 19, 2015, Hon M A Nanzushi (then Senior Resident Magistrate) convicted him of the main charge and sentenced him to 20 years' imprisonment.

5 Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and *vide* a judgment delivered on October 31, 2018, Riechi J found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

6 Unrelenting, the appellant has now filed this appeal and probably the last appeal vides a notice of appeal dated October 16, 2019, and undated grounds of appeal raising the following grounds:

1. That the learned appellate judge of the high court erred in law by upholding the appellant's conviction and sentence of 20 years awarded by the lower court without considering that the ingredients of the offence of defilement were not proved to the required standard of the law.

2. That the learned appellate judge of the high court erred in law by not considering that failure of the learned trial magistrate to consider the appellant's defence alongside the prosecution's evidence amounted to a misdirection to court the appellant also fell on this error which is fatal to the prosecution case. (*sic*)"

7 Briefly, the background to this appeal is that on July 14 , 2013, PW1 was at her grandmother's home when the appellant called her using her grandmother's mobile number and asked her to meet him at Kamukuywa. She proceeded there and met the appellant who later took her to Kiminini and Makuserwa at the appellant's brother's house where they spent the night and had sex for two days. The appellant then left her at Kamukuywa market where she met her mother (PW2) who took her to her grandmother's house and she told her mother that a person had cheated her. On July 17, 2013, her aunt found the appellant at Kamukuywa and they reported the matter to AP officers. The appellant was later arrested.

8 PW2 was ON, PW1's mother. It was her evidence that on July 14, 2013, she received information that PW1 who was living with her grandmother had escaped with her grandmother's phone. After two days she spotted PW1 at Kamukuywa market and PW1 informed her that she was with the appellant. They later reported the incident to AP officers who arrested the appellant.

9 PW3 was CPL Zilda Kilili attached to Kimilili police station and the investigations officer in this case. It was her evidence that on July 17, 2013, she was in the office when PW1 came in the company of her parents and AP officers who had arrested the appellant and reported that on July 14, 2013, the appellant had taken PW1 from her home and defiled her for two days. She later recorded witness statements.

10 PW4 was Gitonga Kipnaye a clinical officer at Kimilili District Hospital. He produced a P3 Form in respect of PW1 who had a history of defilement by a person well known to her. Upon examination, he confirmed defilement as her hymen was broken and there were traces of a white discharge.

11 The appellant in his defence elected to give a sworn statement and denied having committed the offence and stated that he was arrested when he went to check on his property that had been destroyed by his uncle.

12 When the matter came up for plenary hearing on December 7, 2022, the appellant who appeared in person sought to rely on his written submissions. Ms Githaiga on the other hand, learned counsel for the respondent relied on her written submissions dated March 14, 2022.

13 We have considered the record, the rival oral and written submissions, the authorities cited and the law.

14 The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In *Kados v Republic* Nyeri Cr. Appeal No. 149 of 2006 (UR) this Court rendered itself thus on this issue:

> ...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

15 In *David Njoroge Macharia vs. Republic* [2011] eKLR it was stated that under Section 361 of the *Criminal Procedure Code*:

> Only matters of law fall for consideration and the court 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 also Chemagong vs. Republic [1984] KLR 213)."

16 Turning to the 1st ground of appeal, the appellant faulted the high court for upholding his conviction without considering that the ingredients of the offence of defilement were not proved to the required standards.

17 Regarding the age of PW1, it was alleged in the appellant's written submissions that the same was not conclusively proved since it was based on the evidence of the state counsel on appeal that PW1 was found to be 16 years and that as such, he ought to have been charged under Section 8 (1) (4) of the *Sexual Offences Act* as opposed to Section 8 (1) (3).

18 On penetration, it was the appellant's submission that the torn hymen was not conclusive proof of penetration and that there was need for other supporting evidence.

19 On the other hand, it was submitted for the respondent that the age of PW1 was conclusively proved as PW2 in her statement was very clear as to the age of PW1 since she stated that she was born in 1998, which evidence was corroborated by the age assessment report produced by PW4.

20 On penetration, it was submitted that the findings on the P3 form were proof of penetration, which evidence was corroborated by the testimony of PW1 and PW2.

21 On identification, it was submitted that the appellant was no stranger to the complainant and she knew him well as they had spent several days together at Makuserwa and there was no possibility of mistaken identity.

22 It is now well settled that for a conviction to be found on a charge of defilement three key ingredients must be proved namely; age of the victim, proof of penetration and identification of the appellant as the perpetrator of the offence.

23 On the first issue regarding the age of the complainant, PW1 on examination by the court stated that she was born in 1998 and was 15 years old. PW2 who was her mother testified that PW1 was 15 years old and that she was born in 1998. The evidence of these two particular witnesses was corroborated by the evidence of PW4 who conducted age assessment on PW1 and confirmed that she was 15 years old.

24 The appellant did not even attempt to cross examine these witnesses as regards the age of PW1. The issue of age was therefore not contested and there was no suggestion that she was aged otherwise. The appellant's contention that PW1 was 16 years old is therefore clearly without basis and wholly erroneous.

25 PW1 who was old enough confirmed that she was 15 years old which evidence was corroborated by her own mother. Nobody can know better the age of a child than a mother. Consequently, nothing turns on this point.

26 Turning to penetration, PW1 who was 15 years old at the time of the offence gave a detailed testimony of how she was defiled by the appellant for two days when she *inter alia* testified thus; "we did sex for

two days" which evidence remained largely uncontested. In re-examination PW1 stated as follows; "we did sex for the 1st time on 14.7.13.....".

27 PW1's evidence was corroborated by the evidence of PW4 who indeed confirmed that PW1 had been defiled and her hymen had been broken with traces of a whitish discharge. Consequently, nothing turns on this point.

28 The next question for our determination is whether the appellant was properly identified. PW1 gave a detailed account of how she met the appellant who called her using her grandmother's phone and requested her to meet him at Kamukuywa and she obliged. They kept moving around and eventually went to the house of the appellant's brother where they slept for two days and had sex. There was therefore no possibility of any error the appellant having stayed with PW1 for two days and the appellant did not seem to suggest as such.

29 Additionally, PW1 gave out the appellant's phone number which he used to call her and this evidence was not challenged in cross examination. PW1 also took PW2 to the house of the appellant's brother where she was defiled although they did no find the appellant there. He was eventually found at Kamukuywa and PW1 immediately identified him. The identity of the appellant is therefore not in question and he did not contest the same. This was a case of identification by recognition. Consequently, this ground of appeal fails in its entirety.

30 Finally, the learned judge was faulted for not considering that the trial court failed to consider the appellant's defence alongside the prosecution's evidence which amounted to a misdirection. The learned trial magistrate while considering the appellant's defence stated as follows:

> When placed on defence the accused elected to give unsworn statements called no witnesses (*sic*). He alleged that on July 11, 2013 he went to Misikhu to check on his property which had been destroyed by his uncle, he went to report to the village elder, he went to report to West Kenya too he was arrested and charged. (Sic). I have evaluated the evidence before the court. The prosecution has proved its case to required standards. The accused has not introduced doubt in evidence of prosecution hasn't even tried to legate (*sic*) the evidence and has not denied having defiled the complainant. (*sic*) I hereby find him guilty and proceed to convict under sec 215 CPC."

31 From the circumstances of this case and having reevaluated the totality of the evidence on record *viz- a viz* the appellant's defence, which evidence we find to be overwhelming and watertight, we have absolutely no basis to fault the learned trial magistrate for the finding she arrived at regarding the appellant's defence. The same was hollow, a mere denial and an afterthought. Consequently, this ground of appeal must as well fall by the wayside.

32 Accordingly, we are in agreement with the concurrent findings by both the trial court and the high court that the prosecution established the offence of defilement against the appellant beyond any reasonable doubt. In our view, there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement. It was the appellant who defiled PW1.

33 We therefore find and hold that the appellants' conviction for the offence of defilement was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant's appeal on conviction.

34 Turning to sentencing, the appellant was handed a minimum sentence of 20 years as provided under section8 (1) (3) of the *Sexual Offences* Act No 3 of 2006. We have considered the circumstances under which the offence was committed and we do not consider the same to be aggravated.

35 Accordingly, we are inclined to exercise our discretion in favour of the appellant and substitute the sentence 20 years' imprisonment meted out on the appellant with a sentence of 15 years' imprisonment to run from the date of sentencing in the trial court.

36 The appellant's appeal only succeeds to that extent. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 31ST DAY OF MARCH, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR