Kathu v Republic (Criminal Appeal 65 of 2020)
[2023] KECA 250 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 250 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 65 OF 2020

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

MARCH 3, 2023

BETWEEN

ISAAC KIMANZI KATHU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya (Achode, J.) dated 7th February, 2012. in Nairobi H.C.CR.A No. 309 of 2010)

JUDGMENT

1. Isaac Kimanzi Kathu, ("the appellant"), in a spirited and unstoppable attempt to take a second bite at the cherry, has preferred this second and perhaps last appeal challenging his conviction and sentence for the offence of defilement. Our role as the second appellate court was succinctly set out in the case of *Karani vs.Republic* [2010] KLR 73 wherein this Court expressed itself thus:-

> " This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior 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 matters of law."

2. We shall bear in mind these injunctions as we consider this appeal. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on the December 24, 2009 in North Eastern Province, the appellant intentionally and unlawfully caused his genital organ, namely the penis to penetrate the genital organ of HB, namely, the vagina, a child aged 15 years. The appellant denied the charge.

3. The prosecution called six witnesses during the trial. These were: HB, AAA, Senior Sgt Omar Adan and PC Edward Ndaiya, Dr. Salat Mohamed from Wajir District Hospital and PC Peter Macharia.

4. Briefly, the prosecution case was that HB, (PW1), who was aged 15 years old at the time, was living with her sister AAA (PW2) in Wajir. On December 24, 2009 while sleeping with her sister outside the house due to a heat wave, she woke up at around 10 pm to answer to a call of nature. While at it, someone called her and when she checked, she was grabbed and put in a motor vehicle which sped off. She was taken to a house she did not know and sexually violated several times, until she lost consciousness. She had not recognized or identified the assailant throughout the night as the house remained in darkness but only did so in the morning when she saw him as he left the house for a call of nature. That person was the appellant. He had left behind a mobile phone which HB used to call AAA for help. AAA came in the company of other police officers who forced the door to the house open.

5. The appellant was at the time in the toilet and when he came out, HB identified him to the police officers who immediately arrested him. They proceeded to Wajir Police Station and later to hospital where she was examined and treated. She then remembered that she had forgotten her bra in the appellant's house. In the company of the police officers, they went back to the house and recovered the said bra and equally collected the bed sheet which was soiled in blood. PW2, an Administration Police Officer confirmed that they were indeed sleeping with HB on the material night and when she woke up and found her missing, she started looking for her in the neighbourhood and then reported H.B as missing to Wajir police station. That after a short while she received, a distress call from HB. In the company of three police officers, they proceeded to the scene and called out her name, who then responded from the house.

6. According to her, HB was a minor having been born in 1995. According to Senior Sgt Adan Omar, (PW3) who at the time was attached to the D.C's office in Wajir East, was at home when at around 10.00am, PW2 called her and informed her that H B had called her and informed her that she had been locked in a house behind Wajir Hospital. He thereafter mobilized police officers and proceeded to the scene and on arriving, PW2 called out her name, and H.B's response led them to the house, which they forced open. She came out and informed them that she had been sexually violated.

7. Instantaneously, the appellant emerged from toilet and HB pointed out to them as the assailant and was arrested. The appellant and HB were then escorted to the police station then to the hospital where they were examined and when HB stated that she had forgotten her bra in the appellant's house, both were again escorted back to the house and the bra was recovered as well as blood-stained bed sheet. PC Edward Ndaiya (PW4) then attached to the D.Cs office Wajir, on December 25, 2009 at 9:00 am while at the AP Camp, PW2 came in the company of four police officers with a complaint that HB had been abducted. They immediately commenced a search and thereafter received information that HB was locked in the house of the appellant. PW3 forced open the door and found HB Soon thereafter, the appellant emerged from a toilet. HB identified him as the assailant and he was arrested and taken to Wajir police station.

8. Dr. Salat Mohamed, (PW5) examined HB and confirmed that there was presence of spermatozoa which signified the act of sexual assault. PC Peter Macharia, (PW6) the investigating officer reiterated the evidence of PW2, 3 and 4 save to add that he took HB for age assessment and it was established that she was 15 years of age at the time of the incident.

9. In his own defence the appellant gave a sworn statement. He stated that on the material day he and his workers went to a club for refreshments and only came back to his house at around 1.00 am. That in the morning Administration police officers came to his house in the company of HB and the Deputy Officer Commanding Police Division who arrested him on the allegation that he had defiled HB whom

he did not know. That the case was a fabrication resulting from an incident in the past where he had caused to be arrested someone who had stolen his household goods and his father had sworn to teach him a lesson.

10. The trial Magistrate after considering the evidence found the appellant guilty as charged, convicted and sentenced him to 20 years imprisonment.

11. The appellant was aggrieved and appealed to the High Court which appeal was upon hearing dismissed in its entirety. As already stated, the appellant is now before us on second appeal on the grounds that the offence was not proved to the required standard, prosecution case was inconsistent and contradictory and that his defence though plausible was wrongly rejected.

12. During the hearing of the appeal, the appellant appeared in person while the office of the Director of Public Prosecutions was represented by Ms. Ngalyuka, learned Senior Prosecution Counsel. The appellant filed written submissions which he relied on entirely in arguing his appeal.

13. He submitted that the offence of defilement was not proved beyond reasonable doubt. First, the age of HB was not succinctly proved as required since there was disparity in the age of HB given by some of the witnesses and the age assessment certificate tendered in evidence. As regards penetration it was submitted that other than the presence of spermatozoa, there was nothing to suggest that HB had lost her hymen and or open vaginal injuries to prove penetration.

14. Secondly, there were contradictions in the evidence of HB in that she stated that she did not know the appellant but in the P3 form it is noted that it was someone known to her. Further, she claimed that they were sleeping outside, whereas PW2 stated that they were sleeping inside the house. That from these disparities, the court ought to have found the prosecution evidence wanting.

15. Finally, he submitted that the defence he raised was plausible but the trial court failed to consider it. In the penultimate, the appellant prayed that the appeal be allowed.

16. Ms. Ngalyuka, in opposing the appeal, urged that the offence had been proved on all the limbs given that the appellant was properly identified by HB, PW2, PW3 and PW4. Though the trial court relied on the evidence of a single witness on identification, it warned itself of the danger, but found the HB to be truthful, honest, coherent and reliable witness. That there were concurrent findings of the two courts below on identification of the appellant as the perpetrator of the offence. Secondly, the age of HB was proved through her own evidence and that of PW2 as well as that of PW6. Above all, penetration was proved by HB and PW5. The first appellate court therefore discharged its duty of re-evaluating the evidence afresh and arriving at its own independent findings. It equally considered the defence tendered by the appellant and dismissed the same and rightly so as it was not plausible.

17. Having considered the record of appeal, submissions by both parties, and the authorities cited and the law, we reiterate the fact that this is a second appeal.

18. The issue of law that we must determine is whether the prosecution established that H.B was defiled, and whether the appellant was properly identified as the perpetrator of the crime. The two courts below arrived at concurrent findings of fact that H B was defiled and that the appellant was the person who did so. In *Adan Muraguri Mungara v Republic,* [2010] eKLR, this court stated the circumstances in which this court may interfere with the concurrent findings of fact by the trial court and the first appellate court, as follows:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no

reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling thiscourt to interfere."

19. Applying this yardstick to the appeal before us, it behoves us to consider whether there is justification to interfere with the concurrent findings of fact that were arrived at by the two lower courts, and whether the decision of the first appellate court should stand. There is no doubt at all that HB was aged 15 years at the time of the incident. This was attested to by H B, PW2 and PW5 who even tendered in evidence age assessment report. She was therefore a minor. There is as well no doubt that the perpetrator of the offence was none other than the appellant. He was pointed out to the police officers by HB in broad daylight as he emerged from the toilet. Further, H B was found in his house. He never disputed the fact that the house belonged to him. Further, HB's bra as well a blood stained bed sheet was recovered from his house. Indeed, it was as though he was caught red handed and in the act. Given the foregoing, the identification of the appellant cannot be in doubt. Penetration too was proved as required. Medical evidence attested to this fact. Further, a blood stained bed sheet was recovered from his house. As already stated, there were concurrent findings by the two courts below on all these aspects. It has not been demonstrated to us that in reaching these conclusions, the two courts below acted outside the realm of law or acted perversely as to invite our interference.

20. On the issue of contradictions and inconsistencies, we reiterate that as a second appeal we are concerned with issues of law only. The alleged contradictions and inconsistencies are all matters of fact. Further, even if they were matters of law, having carefully considered the record, we are satisfied just like the two courts below that the same are minor, inconsequential and did not impugn the guiltiness of the appellant.

21. In light of the evidence of HB, PW2, PW3, PW4 and PW6, the appellant's defence that he was framed with the case because of another offence involving an unknown person cannot hold. There was absolutely no nexus at all between the purported defence by the appellant and the case that was before trial court.

22. Eventually, we come to the inevitable conclusion that this appeal is devoid of merit. Accordingly, it is dismissed in its entirety.

Dated and delivered at Nairobi this 3rd day of March, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR