Mechi v Republic (Criminal Appeal 52 of 2020) [2023] KECA 221 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 221 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 52 OF 2020

MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA

MARCH 3, 2023

BETWEEN

DOMINIC WAKIBILI MECHI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of the High Court at Kiambu dated 15th January 2019 (MUMBI NGUGI, J.) in Criminal Appeal No. 156 of 2017.)

JUDGMENT

Background

1. The appellant herein was charged and convicted of the offence of defilement contrary to section8 (1) as read with 8(2) of the *Sexual Offences Act*. The particulars were that; on March 21, 2014 at Ndaka-in Gatanga District in Muranga County, intentionally caused his penis to penetrate the vagina of PK a child aged 8 1/2 years.

2. He also faced a second count of unlawfully being present in Kenya contraryto section 25 (a) of the *Refugee Act*. for which he was convicted on his own plea of guilty and sentenced to a fine of Kshs 50,000/= in default, serve 1 year imprisonment, after which he was to be repatriated to Uganda after the outcome of count1.

3. This being a second appeal, the court is restricted to address itself on matters of law only as stated in *Adan Muraguri Mungara v Republic* [2010] eKLR: -

> “ 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 this court to interfere."

4. We shall however briefly revisit the facts of the case only so as to satisfy ourselves that the two courts below arrived at concurrent findings of fact, and so carried out their mandate as required by the law.

5. A brief recount of the prosecution's case in which 5 witnesses were called was that, PW1, SM the mother to the complainant was told by her son that the appellant had done bad manners to PW2, PK and upon enquiry PW2 confirmed that it was true and was in pain when she tried to urinate. PW2 gave unsworn evidence, to the effect that she had left school when the appellant followed her into the kitchen, removed both his clothes and hers and proceeded to defile her. PW3, CPL Thomas Muriithi of Dadaab Police Station was the investigating officer and he testified that after a report was made of defilement by PW1 while accompanied by her husband and PW2, he escorted them to hospital where it was confirmed that the minor had been defiled and infected with a sexually transmitted disease (STD). She was treated and the appellant arrested. PW4, dr Gachanja Kamau testified that the PW2 was examined and it was found that her labia majora had tears and lacerations around it, her vaginal orifice was open and gaping, there was white discharge and presence of pus cells. The appellant was also examined and found to have pus cells which were similar to what was found in PW2. PW5, HA the complainant's father testified that he was at work when his son informed him that there was a man in their kitchen. He rushed home and found the appellant with his daughter. He raised alarm and the appellant tried to escape but neighbours helped him arrest the appellant. PW2 was then crying. He then took the appellant to the police station where he was re- arrested.

6. The trial court placed the appellant on his defence whereupon he gave an unsworn testimony. He averred that he had given the PW2's father a loan which he refused to pay and when he asked for the money, he was told he would be taught a lesson and that is when a few days later he was arrested. He denied that he committed the offence adding that the evidence that was adduced was that of family members which evidence was not corroborated by independent witnesses.

7. The learned trial magistrate upon assessing and analyzing the evidence tendered found the appellant guilty of the offence of defilement, convicted him and sentenced him to life imprisonment. Aggrieved with both the conviction and sentence, the appellant appealed to the High Court. The High Court at Kiambu (Mumbi Ngugi, J as she then was) in a judgment dated January 15, 2019 upheld both the conviction and sentence.

8. The appellant has now preferred this second appeal against both his conviction and sentence, *vide* his memorandum of appeal which raises five (5) grounds of appeal, as amended in his home- made written submissions as follows; -

    a. That , the High Court judge erred in law by failing to find that the appellant was a minor below 18 years at the time of arrest and had no representation while conducting the trial.

    b. That , the High Court judge erred in law by upholding a trial that was grossly unfair contrary to articles25 and 50 of the *Constitution* to the prejudice of the appellant herein.

    c. That , the two lower courts below erred in law by failing to find that the elements of the offence of defilement were not proved beyond all possible reasonable doubts as required by the law.

    d. That , the 1st appellate court judge erred in law by failing to find that, the case was not proved beyond reasonable doubt, essential witnesses did not testify in this case and those who testified gave insufficient, uncorroborated and incredible evidence and that the decision that the appellant defiled the minor was unsound in law.

e. That , the two courts below erred in matters of law by failing to consider the appellant's defence.

9. When the appeal came up for virtual hearing before us on the September 26, 2022, both parties, the appellant acting in person and Mr Okatch learned counsel for therespondent submitted that they would solely rely on their respective filed written submissions.

Submissions

10. The appellant submitted that his age was never established; that although there was an age assessment report that stated his age was between 17-18 years the same was never clarified in court despite numerous orders for the doctor to come to court and do so. He stated that at the time of his arrest he was below 18 years and should have therefore been sentenced in accordance with the Children's Act. He protested that the trial was conducted in a manner that was contradictory to articles27, 47, 50 and 159 of the *Constitution* and the trial court only protected the interests of PW2 despite him and PW2 being minors. Further, that the trial court ignored the fact that PW2 at one time wanted to withdraw the case.

11. He submitted that he was also never supplied with all documents he needed to prepare for the trial and the case proceeded when he was unwell. It was his case that the elements of the offence were not proved beyond a reasonable doubt as it was not proved that there was penetration or that he is the one who caused the alleged penetration. He added that the prosecution case was laced with hearsay evidence and contradictions between the evidence given prior to the case starting de novo and thereafter, especially the testimonies of the PW2'S parents. Finally, he submitted that key witnesses were never called to testify which further weakened the case for the prosecution.

12. The respondent filed submissions dated September 19, 2022, submitting that the appellant defiled PW2 in the kitchen and was seen by a child who was a neighbour who then informed the PW2's brother who informed their mother. That PW2's mother in turn confronted the appellant at his place of work which was a farm and he was arrested by members of the public after the PW2 identified him as her assailant. It was the submission of the respondent that the PW2'S testimony was corroborated by the expert witness (doctor) and medical forms produced in this regard. The respondent urged the court to dismiss the appeal for want of merit.

Analysis & Determination

13. We have carefully considered the record of appeal and the submissions by both the appellant and the respondent. The appellant's first ground of appeal is that he was a minor at the time of his arrest and conviction and he ought to have been sentenced under the *Children's Act*.

14. It is trite to note that he never raised this issue in his first appeal and the trial court did not address itself on it. A perusal of the court record shows that the appellant first raised the issue on the October 27, 2014before the trial commenced. It would appear that the trial court ordered for his age assessment and there is reference to one which indicated he was between 17-18 years of age. Thereafter, the trial court made several orders for the doctor to appear before court and explain how old the appellant was but the said doctor never appeared in court and the issue was ignored by all parties and was never raised again until at the hearing of the instant appeal.

15. Notably, is that, the issue of the age of the appellant is a matter of fact. It was neither raised before hon AM Maina who succeeded hon BJ Bartoo who first heard the case nor before the learned the judge in the High Court. The appellant has raised it too late in the day before this Court when the law does not

allow us to address matters of fact. We consider the matter being raised at this point is an afterthought, and accordingly, we dismiss it.

16. The appellant contends that the trial was conducted in a manner that violated his rights as enshrined in article 25 and 50 of the *Constitution*, that he was not supplied with the prosecution evidence in a timely manner and as such, he was not given sufficient time to prepare his defence. He also complained that the trial court disregarded the PW2'S wish to withdraw the case and that he was not assigned an advocate.

17. The record shows that the appellant made a request for the P3 form on the November 17, 2014and the hearing was adjourned to the December 10, 2014. The appellant did not alert the trial court that he had not received the P3 form when the court next convened. The safe conclusion that can be drawn from the record is that the appellant received the witness statements within a reasonable time to prepare his defence as attested by the fact that he extensively cross-examined the key prosecution witnesses. Therefore, it cannot be concluded that the delay in providing the witness statements to the appellant impeded or violated his rights to a fair trial under articles 50 (2) (c) and (j) of the *Constitution*.

18. We similarly find that the appellant was not prejudiced in any way by the fact that he was not represented by an advocate or was not provided with one. Article 50(2)(h) provides that an accused person has the right "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." As observed herein above, the appellant ably and extensively cross examined all prosecution witnesses as a testament that he understood the charge and evidence levelled against him. Accordingly, no substantial injustice was occasioned to him. We find no merit in this ground of appeal and submission.

19. As regards the issue of the request by the appellant to have the case withdrawn, the trial court in its decision stated; "since it is a sexual offence act, there is no way the complainant can withdraw the case". We cannot fault the trial court as it was correct in its holding which accorded with section 40 of the *Sexual Offences Act* which provides:

> "The decision as to whether the prosecution or investigation by any police officer of a complaint that a sexual offence has been committed should be discontinued shall rest with the Attorney-General."

20. It suffices to note that the *Sexual Offences Act*, was enacted when the prosecutorial powers lay with the Attorney General. Currently, prosecutions are conducted by the Director of Public Prosecutions. For the foregoing, this ground of appeal as well has no merit and the same fails.

21. On the question of whether a sufficient number of witnesses were called, and hence crucial witnesses left out, section 143 of the *Evidence Act* provides:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

22. With this provision in mind, what is important is for the prosecution to call the witnesses necessary to establish its case, unless the failure to call certain witnesses can draw an adverse inference. In the circumstances of this case, the latter has not been proffered and we are satisfied that the prosecution called the witnesses required to prove its case.

23. It was also the appellant's contention that the case was not proved beyond a reasonable doubt. It is settled law that for a charge of defilement to be established, the prosecution must demonstrate proof of the age of the minor, penetration and identity of the perpetrator.

24. As regards the age of the minor, the same was proved by way of an immunization card adduced by PW1, the minor's mother. Hence her age was established as a fact, which fact was arrived at by concurrent findings of the two courts below. It was established that the minor was born on April 20, 2006 and therefore below the age of 11 years as at the date of the incident. Regarding identification of the appellant as the perpetrator, the first appellate court found no reason to interfere with the trial court's reliance on the evidence of PW2 to convict the appellant on the strength of the proviso to section 124 of the *Evidence Act*. In the same breath, the two courts below arrived at a similar finding of fact that penetration was proved by the evidence of the minor which was corroborated by the medical report and evidence of PW4, who stated that there was penetration to the minor's genital organ, namely the vagina. Similarly, there is no reason for this court to interfere with the trial court's assessment, affirmed by the first appellate court, that PW2's evidence was forthright and free from contradictions.

25. The appellant's complaint that the two courts below disregarded his defence cannot be sustained. There was no evidence to indicate that there was bad blood between the appellant and the PW2's father.

26. On our part, we are satisfied that the appellant was properly convicted and sentenced by the trial court and the first appellate court carefully analyzed the evidence and arrived at a well- founded decision which upheld both the conviction and sentence. We find no merit in this appeal and dismiss it 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

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR