Munyana v Republic (Criminal Appeal 181 of 2018)
[2023] KECA 426 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KECA 426 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 181 OF 2018

F SICHALE, LA ACHODE & WK KORIR, JJA

APRIL 14, 2023

BETWEEN

PATRICK WAMARA MUNYANA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kitale (Hon. H.K. Chemitei, J.) delivered and dated 10th May, 2018) In HC CR Appeal No. 93 of 2013)

JUDGMENT

1. Patrick Wamara Munyala, the appellant herein, was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* and was subsequently sentenced to life imprisonment. The particulars of the offence alleged that the defilement was committed on October 23, 2023 at (Particulars Withheld) within Trans Nzoia County when the appellant penetrated the vagina of ENL, a girl aged ten years, with his penis. The appellant faced an alternative charge of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Having been convicted of the main charge, a recital of the particulars of the alternative charge is not necessary. The appellant's conviction and sentence were confirmed by the first appellate court. He is aggrieved by the decision of the first appellate court and is now before us on a second appeal.

2. In summary, the case against the appellant was that on October 23, 2012 at about 4.00 pm, ENL (PW2) was sent by her step-mother to purchase vegetables from the appellant. Upon arriving at the appellant's farm-house, the appellant dragged the girl inside his house, laid her on the floor, and proceeded to defile her. The girl then went back home in pain but did not tell her step-mother what had transpired. On October 26, 2012, the complainant informed her teachers at school that she had been defiled by the appellant. She also informed her biological mother, JN (PW1), that she had been defiled by the appellant. Upon physical examination, PW1 saw bruises on the complainant's vagina. The appellant was then arrested by PW4 (SM), a retired police officer, on the verge of being lynched by a mob LL

(PW5), a clinical officer attended to the complainant at Kitale District Hospital and concluded that she had been defiled. In his defence, the appellant denied any knowledge of the offence.

3. In this appeal, the appellant raises the grounds that the conviction was founded on unreliable evidence of incredible witnesses; that the element of penetration was not proved; that the qualifications of the expert witness were not established; that his defence was not considered; that the sentence was harsh, excessive and mandatory in nature hence denying the trial court an opportunity to exercise discretion; and, that there were two conflicting judgments emanating from the trial court.

4. During the hearing of this matter on December 7, 2022, the appellant appeared in person while Ms Kiptoo appeared for the respondent. Both the appellant and the Ms Kiptoo having filed their written submissions sought to rely entirely on them. The appellant's submissions addressed all the grounds upon which his appeal is premised. On the existence of two judgments and

   the ambiguity arising therefrom, the appellant submitted that the trial court rendered two separate sentences with the sentence of life imprisonment appearing at page 32 of the record of appeal while another sentence of 20 years imprisonment appears at page 33 of the record. It was his contention that this error on the part of the trial court contravened the law on how judgments should be drafted and was also prejudicial to him as he did not know the sentence which the court passed against him. He further submitted that the sentence of 20 years was authentic and reasonable as it was signed by the trial magistrate.

5. On the alleged incredibility of the witnesses and the unreliability of the evidence, the appellant submitted that PW2 was unreliable and that her evidence ought to be struck off the record for failure to conform to Section 25A of the *Evidence Act*. He also contended that PW2 gave evidence that was contradictory with regard to the dates and days of the commission of the offence and of his arrest. In his view, PW2 was an untrustworthy witness.

6. The appellant also submitted that the element of penetration was not proved in this case. His contention was with the evidence of PW5 and the production of the P3 form. He argued that the qualifications of PW5 were not established and therefore the procedure adopted in the production of the P3 form contravened the law. He challenged the contents of the P3 form on the ground that it is not known whether PW5 was qualified to medically examine the complainant. He therefore asserted that the evidence of PW5 cannot be relied upon to prove penetration hence this element was not established. Still on this issue, the appellant referred to the case of *Okeno v Republic* [1972] EA 132 as outlining the duty of a first appellate court and submitted that the first appellate court abdicated its duty of re-evaluating the evidence by not addressing the issue of the qualifications of the medical officer. He argued that had the first appellate court performed its duty, it would have reached a different conclusion from that of the trial court.

7. The appellant submitted that his evidence was not considered by the trial court and the first appellate court. It was his contention that he tendered an alibi defence which was not considered. The appellant cited *Kiarie vs. Republic* [1984] KLR 739 as stating the law as to how an alibi defence is to be treated. He also faulted the trial court for not giving reasons for dismissing his defence contrary to the requirements of Section 212 of the *Criminal Procedure Code*. He stated that his defence ought not to have been dismissed without any reasons being given for the decision. He also argued that had his defence been considered, it would have been established that he was not culpable.

8. Finally, on the issue of sentence, the appellant submitted that the mandatory nature of the life sentence under Section 8(2) of the *Sexual Offences Act* denied the trial magistrate the discretion to consider his mitigation. He also submitted that due to the existence of two separate sentences, the sentence of 20

years imprisonment was reasonable in the circumstances considering his mitigation. In the end, he urged us to allow his appeal in its entirety by quashing the conviction and setting aside the sentence.

9. Ms Kiptoo for the respondent rebutted the appellant's submission that there were two separate judgments arguing that there was no link between the contents of page 32 and page 33 of the record. In her view, the signing of page 33 of the record of appeal should be investigated as it seeks to mislead the court. She pointed out that typed proceedings are rarely signed and are only dated as a reflection of the primary proceedings.

10. Ms Kiptoo rebutted the appellant's submission that the witnesses were not credible and the evidence unreliable by arguing that the appellant did not shake the evidence during cross-examination. She also relied on the case of *Erick Onyango Odeny v Republic* [2014] eKLR to submit that minor contradictions should not be treated as material to the case. She also submitted that Section 25A of the *Evidence Act* was not applicable to this case as the provision deals with confessions and there was no confession evidence adduced at the trial.

11. On the ground that penetration was not proved, counsel for the respondent submitted that the evidence of PW5 corroborated the evidence of PW2 who had testified that she was penetrated by the appellant.

12. As regards the qualifications of PW5, counsel submitted that the appellant did not object to PW5 producing the medical documents. She argued that PW5's testimony that he worked as a clinical officer at Kitale Hospital was never challenged. Counsel also maintained that the defence of the appellant was considered and found to be a mere denial. She further postulated that the alibi defence by the appellant was rebutted by the prosecution through evidence confirming that the appellant was arrested on the road and not in the farm.

13. Regarding the sentence, counsel relied on the case of *Felix Anthia Munyai v Republic* [2019] eKLR to submit that the court acted within its discretion in passing the life sentence against the appellant. She argued that the circumstances of this case warranted a life sentence.

14. This is a second appeal and our mandate, is as provided under Section 361(1) of the *Criminal Procedure Code*. Our jurisdiction is limited to matters of law only and as for sentence, we can only intervene where the sentence was enhanced by the first appellate court or where the sentence passed was illegal. We ought not to touch on factual matters save for instances where the findings made are not supported by the evidence on record. See *Adan Muraguri Mungara v Republic* [2010] eKLR.

15. We have given due consideration to the record of appeal, the grounds of appeal as well as the submissions of the parties and the authorities cited and we identify the following issues as requiring our determination; whether there were two separate sentences passed against the appellant; whether the evidence of PW5 was properly admitted; whether the appellant's defence was considered; and, whether the sentence is lawful and warranted.

16. The first issue for our determination is whether the appellant was given two separate sentences for the same offence by the trial court. The appellant referred us to pages 31, 32 and 33 of the record of appeal arguing that there were two different sentences passed against him; one of life imprisonment and another of 20 years imprisonment. He faulted the trial court's action but also argued that the latter was more authentic because it was dated, signed and reasonable as it considered his mitigation. The respondent on the other hand argued that the only sentence passed by the trial court was that of life imprisonment and there was no nexus between the contents of page 33 of the record of appeal and pages 31 and 32.

17. The revelation by the appellant appeared to us quite disturbing.

We have traced the raw proceedings from the trial court's file just to ascertain the truth of this matter. From the trial court's handwritten proceedings, there was no handwritten coram or proceedings for August 16, 2013 when the judgment was delivered. We have also established that the typed judgment in the file is the exact copy of the one in the record of appeal and also the same with that in the first appellate court's file. There are no handwritten proceedings in respect to any of the two sentences although the typed record for the first appellate court like the record of appeal before us contains the two versions of sentence. Our review then proceeded to the proceedings before the first appellate court. We have noted that in the petition of appeal and the submissions before the High Court, the appellant was only concerned with the sentence of life imprisonment. Nowhere did he mention the issue of two separate sentences or at least talked of the 20 years imprisonment. It is also apparent that the first appellate court considered only the life sentence. Similarly, in his notice of appeal lodged at Kitale High Court registry on May 22, 2018, it was indicated that the appellant was sentenced to life imprisonment. Furthermore, we also noted that on the cover of the trial court's file, it was indicated that the appellant was sentenced to life imprisonment. The committal warrant must have indicated that the appellant was to serve life imprisonment. Indeed, it can be deduced from the entire record that page 33 which talk of a sentence of 20 years is not a continuation from the previous page 32. There is also an order at page 33 discharging the surety and ordering the release of the security document to the surety. This is despite the record showing that the appellant was in remand throughout the trial and was therefore not released on bond. We have also noted that the proceedings on pages 31 and 32 on sentencing appears to be continuous from judgment. We therefore reach the conclusion that page 33 is a stray document.

18. Cognizant that the appellant was charged under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, and taking into consideration our preceding discussion, we have no doubt that the appellant was sentenced to life imprisonment. What remains unanswered is how page 33 of the record found itself in the lower court file and that of the first appellate court. We refrain from making adverse findings on this matter but if the same is a result of mischief, then such actions must be condemned and perpetrators be brought to book. Nevertheless, we reiterate that our finding on this ground of appeal is that the appellant was sentenced to life imprisonment.

19. The second issue for our consideration is whether the evidence of PW5 was properly received by the trial court. The appellant's contention in the main was that the evidence of PW5 was not properly taken as the qualifications of the witness were not established. He also argued that in the absence of the evidence of PW5, then the element of penetration was not proved. Ms Kiptoo on her part argued that the appellant did not object to PW5 producing the medical documents and that PW5 in his testimony established his qualifications, which evidence was not challenged.

20. The production of expert evidence is regulated by Section 48 of the *Evidence Act*. Further, Section 77 of the *Evidence Act* provides as follows:

> "(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> 2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

3. When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

21. The Court in *Mutonyi & another v Republic* [1982] eKLR, expounded on the qualifications to be met for expert evidence to be of probative value in a proceeding as follows:

> " So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:
>
> 1. Establish by evidence that he is specially skilled in his science or art.
> 2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
> 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness."

22. We have perused the evidence of PW5 appearing at pages 21 and 22 of the record of appeal. The witness introduced himself as a clinical officer at Kitale District Hospital. He also proceeded to explain how he arrived at the findings contained in the P3 form. The record shows that the appellant did not object to the production of the medical summary report filled at Cheranganyi Medical Centre by the witness. This is a document that came into the custody of the witness as he was discharging his routine duties. The appellant also cross-examined the witness who elaborated on the factors that informed his conclusion. In view of the foregoing, we make the inevitable finding that the evidence of PW5 was properly taken.

23. Having made the finding above, we find difficulty in agreeing with the appellant that penetration was not proved. The two courts below made a factual finding that the element of penetration was proved. Ours is to pay homage to that fact. Perhaps we only need to add that the evidence of PW5 corroborated that of PW2 that there was indeed penetration of her vagina. PW5 was categorical that the tear to the complainant's hymen was recent. We do not find the evidence of the complainant contradictory either. Further corroboration is found in the evidence of PW1 who testified that she examined the child's vagina and noticed that it was bruised.

24. The next frontier of our inquiry regards the issue whether the appellant's defence was considered. The evidence of the appellant was captured as follows:

> " I reside at Kachibora.
>
> I am farmer.
>
> On October 23, 2012, I was working on the farm. I do not know why I was arrested. I wonder why I was arrested and charged to date. The Police Officer who arrested me knows why I was arrested.
>
> I deny the offence to date. That is all I can tell the court."

Upon cross-examination, the appellant testified that:

> " The charge was read to me and I denied and deny to date. I do not know why the Police Officer arrested me. I never knew the mother of complainant herein. I have never had any grudge with them. That is all."

25. In respect to the appellant's defence, the trial court stated at pages 30 and 31 of the record of appeal as follows:

> " I have considered DW1's evidence as he examined prosecution witnesses and his own unsworn evidence. He failed to controvert the testimony of PW2 herein. Indeed his defence amounts to a mere denial of the charge preferred against him. I reject it in toto."

The first appellate court at page 52 of the record of appealu addressed the appellant's defence as follows:

> " The defence by the appellant was simply dismissive. In fact, the grounds raised in his appeal were too general in nature."

26. On this issue, the record of appeal whose excerpts we have reproduced speaks for itself. The appellant's evidence was taken into consideration and both the trial court and the first appellate court found it to be mere denial. The contents of the defence are matters of fact which the two courts have made concurrent findings. We will therefore not concern ourselves with them. We only reiterate that where it is alleged, as in this case, that the defence was not considered, the only issue of law is whether it was considered or not. If the finding, as we make in this case, is that the defence was considered, the remit of this court's deliberation on that issue ends there. If, however, it is found that the defence was not considered, the Court will then proceed to assess the evidence on record.

27. Our final consideration is whether the sentence passed was legal. We have found that as per the record, the appellant was sentenced to life imprisonment. Contrary to the appellant's submission that the life sentence was passed in its mandatory nature, the record at page 31 shows otherwise. We note that the trial court duly considered the aggravating circumstances as well as the appellant's mitigation prior to concluding that the circumstances of this case warranted a life sentence. That being the case, we see no reason to interfere with the life sentence passed by the trial court. This ground of appeal therefore fails.

28. The upshot of the foregoing is that this appeal has no merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF APRIL, 2023

F. SICHALE

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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