NJM v Republic (Criminal Appeal 10 of 2021)
[2023] KECA 407 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KECA 407 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 10 OF 2021

MSA MAKHANDIA, GWN MACHARIA & WK KORIR, JJA

APRIL 14, 2023

BETWEEN

NJM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court at Nairobi delivered on 28th April 2017 by P. Nyamweya, J. in Criminal Appeal No. 333 of 2013)

JUDGMENT

1. The Appellant was charged with the offence of incest by male contrary to Section 20(1) of the *Sexual Offences Act*. The particulars were that on February 8, 2013 in Machakos District within Eastern Province, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of the complaint, a child aged 8 years who to his knowledge was his daughter.

2. The prosecution called 6 witnesses to advance their case, their testimony being that, the appellant defiled the complainant, PW3, promising to buy her bread and avocado if she persevered the pain. He had defiled her on many occasions prior and always threatened her with death if she ever told somebody about the episodes. She recalled that on the fateful day she was left alone in the house with the appellant, her father, who stopped her from going to school and thereafter defiled her. She informed her mother who did not believe her and so she told PW2, JKK who was a neighbour and her Sunday school teacher. She was thereafter taken to the police station then to hospital by PW2 where she was examined, treated and her age assessed.

3. On the material day, PW2 saw the appellant enter the house with the complainant. She went and called PW4, PMN a village elder and PW5, TNM the area chief who came and found the appellant red handed in the act, and arrested him. PW2 examined the complainant and noted unusual wetness; she took her to hospital where she was treated. PW1, Dr. Fredrick Okinyi testified on behalf of his

colleague, Dr. Mutunga and produced a P3 and Post Rape Care forms which were issued to the complainant upon treatment. It was his testimony that the hymen was perforated, high vaginal swab showed numerous epithelial cells and no spermatozoa. PW6, PC Otieno Grace of Machakos Police Station confirmed that the appellant was taken to the station while in the company of PW3 and PW4 on allegation of having defiled PW3 who was his daughter. She recorded their statements and took the complainant to Machakos Level 5 Hospital for treatment. The appellant was also escorted to the hospital for examination by PC Maxwel Ogutu and PC John Chebii. She later interviewed the complainant who appeared dazed and apprehensive. She told her that the appellant had defiled her.

4. The appellant gave an unsworn statement of defence and stated that he did not wish to comment or give an explanation with regard to the offence.

5. The trial court, upon evaluation of the entire evidence, found the appellant guilty, convicted and sentenced him to life imprisonment. Dissatisfied with the judgment of the trial court, he appealed to the High Court which dismissed his appeal. Still dissatisfied, he has preferred this second and perhaps the last appeal. He has raised five grounds of appeal which we have condensed into three, being that: his constitutional right to a fair trial was violated as he was denied his right to be informed in advance the evidence the prosecution would rely on during trial and to have reasonable access to the same as provided by article 50(2)(j) of the *Constitution*; his right under article 50(2)(l) of the *Constitution* was violated in that he was not informed of his right to have an advocate assigned to him at state expense; and that the life imprisonment sentence imposed did not meet the dictates of the Constitution.

6. When the appeal came up for virtual hearing before us both the appellant acting in person and Mr. Muriithi, learned prosecution counsel for the respondent relied on their respective filed submissions.

7. The appellant submitted that at no time was he informed in advance of the evidence the prosecution intended to rely on and neither did he have access to that evidence. That it was the prosecution's duty to provide him with the said evidence as opposed to him demanding for it. Further that, on account of not being provided with the said evidence, he was unable to cross examine the prosecution witnesses. He questioned why the trial court did not enquire into why he was unable to cross examine the witnesses, which according to him was a pointer that the trial was unfair. He further submitted that the trial court failed to inform him of his right to be provided with an advocate at the State expense as envisioned under article 50(2)(l) of the *Constitution*. He urged us not conclude that he understood the proceedings merely because he proffered a defence. According to him, his defence gave no rejoinder to the prosecution case as he was a lay man who was not conversant with court proceedings.

8. Finally, he submitted that the life imprisonment penalty was harsh and unconstitutional. On its unconstitutionality, he cited article 29(d)(f) which protects a person from being treated or punished in a cruel, inhuman or degrading manner. To buttress this submission, he relied on the cases of *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR and *Simon Githaka Malombe V Republic* [2015] eKLR.

9. In rebuttal, the respondent through its submissions, posited that the evidence of the complainant was corroborated by the medical evidence in the P3 form that PW3 had a perforated hymen, as a testament that indeed defilement was proved beyond any reasonable doubt. That the relationship between the appellant and the complainant was not denied to be that, the appellant was the biological father of the complainant. On proof of the age of the complainant, the same was adequately established to be 8 years and consequently, life imprisonment sentence was proper and legal. We were accordingly urged to uphold both the conviction and sentence and dismiss the appeal in its entirety.

10. This being a second appeal, the Court is restricted to addressing itself on matters of law only; it will not normally interfere with concurrent findings of fact by the two courts below unless such findings

are based on no evidence or they are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Kaingo v Republic* [1982] KLR 213 at page 219 wherein this Court stated that: -

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karoti S/O Karanja versus Republic [1956 17EACA 146]."

11. This mandate is further codified in section 362(1)(a) of the *Criminal Procedure Code* which states that:

> A party to an appeal from a subordinate court may, subject to sub section 8, appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:
>
> a. On a matter of fact, and severity of sentence is a matter of fact; or
>
> b. Against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.

12. We have carefully considered the record of appeal, the submissions by both the appellant and the respondent and the law, upon which we have demarcated the issues arising for determination to be whether; the appellant's right to a fair trial was violated; the offence was proved beyond reasonable doubt; and whether we should interfere with the sentence.

13. On the first issue, the appellant contended that firstly, he was not supplied with documents the prosecution intended to rely on, secondly, he was not given an advocate to represent him and finally, he never cross examined the prosecution witnesses which was indicative that he did not understand the court proceedings or what was going on in the trial.

14. Article 50 (2) (j) of the *Constitution* provides that:

> (2) Every accused person has the right to a fair trial, which includes the right—
>
> (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

15. From this provision, it is clear that the prosecution is under a duty to provide an accused person with, all relevant material whether it is statements of witnesses who will testify at the trial or copies of documentary exhibits to be produced at trial. Indeed, an accused person does not have to requisition for this documentary evidence. It is upon the prosecution to voluntarily supply it to the accused as soon as is reasonably possible after the accused person takes plea. The respondent was silent on this submission for reasons we cannot fathom. Be that as it may, despite this silence, we find that the appellant ought to have substantiated the allegation, at least even elucidate to us as to whether he requested for the evidence and was not supplied.

16. On our part, we have perused the record of proceedings and noted that, at no time did the appellant request for either the prosecution witness statements or exhibits. This leads to a safe conclusion that he must have been furnished with all documentary evidence he required before the trial began and no wonder the hearing commenced without a hitch. Although he never cross examined any of the prosecution witnesses, he was within his legal right to choose whether to cross examine the witnesses

or not. It is also clear to us that he neither raised this issue during the trial nor in the High Court, which is a further testament that he cannot cry foul at this stage. Had he not been furnished with the necessary documentary evidence, the record would bear him correct, but unfortunately the contrast is the position. We find no merit in this ground of appeal.

17. Moving on to the second aspect under the first issue, article 50 (2)(h) of the *Constitution* provides that:

> (2) Every accused person has the right to a fair trial, which includes the right—
>
> (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;

18. It is fundamental to understand that, the right to legal representation is not an automatic right nor is it an absolute right. An accused person has to establish that failure to have legal would cause him substantial injustice. In the Supreme Court Petition No. 11 of 2017, *Charles Maina Gitonga v Republic* (2018) eKLR it was observed that: -

> " ...legal representation is not an inherent right available to an accused person under Article 50 of the Constitution or any provision of the Repealed constitution and that under section 36(3) of the Legal Aid Act No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial."

19. To be clear in the circumstances of this case, the *Legal Aid* Act, No. 6 of 2016 was enacted into law on May 10, 2016, hence the appellant cannot put reliance on a law that was not in existence as at the time of his trial. Having said that, we conclude that the appellant does not meet the threshold set to hold that failure to have legal representation infringed his right to a fair trial.

20. Furthermore, section 302 of the *Criminal Procedure* Act provides for cross examination of witnesses in the following words:

> The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, and to re-examination by the advocate for the prosecution.

21. In this case, the prosecution witnesses were availed for cross examination and the appellant chose not to put across any questions to them. In our view, his failure to cross examine the witnesses is not, of itself, a testament that he did not understand the proceedings. Cross examination of witnesses is a right accorded to an accused person and he/she can opt to exercise it or not. The appellant opted out by choice, he cannot now cry foul that, by virtue that he did not cross examine the witnesses, his right to a fair trial was violated.

22. We further observe that, at no point did he allude to the fact that he did not understand what was going on. He deliberately refused to cross examine the prosecution witnesses but also giving a rebuttal defence as demonstrated by the fact that upon being placed on his defence, he stated "I do not wish to comment or give an explanation with regard to the offence". This statement alone points to the fact that he voluntarily opted not to offer a defence in rebuttal to the prosecution evidence advanced against him. A court of law cannot force an accused person to cross-examine prosecution witnesses or solicit a defence; the best it can do is to accord him an opportunity to ventilate his case in a fair and just platform. How he does it is his choice save that the court is at liberty to guide him in accordance with the law. For this reason, we again find no merit in this ground of appeal.

23. As regards to the second issue, there are some facts that are not in dispute being that, the appellant was the complainant's father and that the complainant was aged 8 years as at the time of the offence as evidenced by an age assessment report from Machakos General Hospital. By the fact that the appellant

was found by PW4 and PW5 red handed in the act compounded by the fact that the medical evidence irrevocably showed that the complainant had been defiled leaves no doubt in our minds that the prosecution discharged this burden of proof. We are therefore, in agreement with the concurrent findings of the two courts below that the appellant committed the offence.

24. As for the sentence, the High Court properly addressed its mind to the operative words in Section 20(1) of the *Sexual Offences* Act that the offender "Shall be liable to imprisonment for life" to mean that imprisonment for life was the maximum sentence for an offence under the section. Both courts below in were cognizant that he was a first offender and most importantly, that he was supposed to be the complainant's protector turned oppressor and perpetrator of the heinous act. We are of a similar view that the appellant abused his position of trust and power over his daughter and so a deterrent sentence was necessary. We find no reason to interfere with the sentence of life imprisonment.

25. In conclusion, we are satisfied that the appellant was properly convicted by the trial court and that the first appellate court carefully reanalyzed the evidence and arrived at a well-founded decision. We are in agreement that, the two courts below arrived at the correct conclusion as to the culpability of the appellant and find no merit in this appeal. We dismiss it in its entirety.

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

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

WELDON KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR