Mulwa v Republic (Criminal Appeal 109 of 2022)
[2023] KECA 693 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 693 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 109 OF 2022

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

MAY 26, 2023

BETWEEN

KYALO MULWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Voi delivered on 29th June 2017 by J. Kamau, J. in High Court Criminal Appeal No 46 of 2016 Original Wundanyi SRM Criminal Case SO 418 of 2015)

JUDGMENT

1. This a second appeal by the appellant Kyalo Mulwa, who is challenging the judgement delivered on 29th June 2017 by Hon J. Kamau, J. in High Court Criminal Appeal No 46 of 2016. The Appellant was charged before the Chief Magistrates Court at Wundanyi with one count of the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act*, herein after SOA. The particulars of the offence were that on the 25th pf August 2015, at around 1pm, in Mwatate Location, within Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the vagina of LW a girl aged 8 years. He faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the SOA. He was found guilty and convicted by the Chief Magistrate, Wundanyi of defilement contrary to Section 8 (1) as read with Section 8 (2) of the SOA, and sentenced to imprisonment for life.

2. It is important at this stage to give a brief summary of the case. The appellant pleaded not guilty to the charges. The prosecution called four witnesses and the appellant testified in his defence. The evidence was that PW1, BMM, the mother of the complainant left the complainant outside playing with another boy, one D . She was in the kitchen thirty minutes later when D went running to her, and reported that he left the complainant with Kyalo. D led PW1 to a nearby bush where she found

the appellant in *fragrante delicto* with the complainant. The complainant was crying. Her panty was hang on a tree. PW1 screamed and members of public went to her aid and arrested the appellant.

3. PW2, the complainant told the court how the appellant took her and D to the bush, then gave D 10/- and told him to go to the shops. That the appellant removed her panty, which he placed on a tree, lowered his trouser and boxers to the knee level and after smearing saliva on her vagina proceeded to defile her. PW1 reported the matter to PW3 IP

   Christine Masaru who investigated the complaint; she took statements from PW2 as well as issued her with a P3 form. Upon completion of investigations, she charged the appellant with the offences as per the charge sheet. PW4, Lucy Kadzo Tuva examined PW1. The examination revealed that PW2 had inflammation on the labia majora and a broken/ torn hymen.

4. In his sworn defence the appellant denied defiling the complainant. He admitted that he was standing next to the child, and that at the time she was crying.

5. The learned trial Magistrate (Hon. N.N. Njagi) vide judgement delivered on August 16, 2016, found that the evidence of the complainant and her mother PW1 established that the appellant defiled the complainant, and that the medical evidence corroborated defilement of the complainant; that the age of the victim was proven vide the birth certificate, P.exh

   1. He noted that the appellant's defence was a bare denial that did not challenge the prosecution case. He found the prosecution evidence overwhelming against the appellant, that it had discharged its burden of proof, and proceeded to find the appellant guilty of the main count of defilement and convicted him accordingly. On the sentence, the learned trial Magistrate imposed life imprisonment after considering mitigation.

6. The appellant raised five grounds of appeal before the High Court, in which he faulted the learned trial Magistrate:

   a. for accepting the evidence of the victim which was not proved to support the sentence ;

   b. for believing, the evidence of the medical report relating to the broken hymen and hence penetration;

   c. for failing to consider the importance of a first offender in relation to the sentence;

   d. for finding that the prosecution had proved the case against him beyond reasonable doubt; and,

   e. for failing to consider the importance of the evidence of his arresters to prove the case, which was missing.

7. Before the High Court the appellant argued that no evidence was adduced to prove the age of the victim, PW2 LW. It was urged that the mother of PW2, who was PW1, BMM contradicted the charge sheet, which indicated that the victim's age was 8 years while she said that the victim was 7 years old. The learned Judge found that for the offence under Section 8 (1) and (2), all the prosecution needed to prove was that the child victim was 11 years or below. That whether the victim was 7 or 8 years did not affect the sentencing. That from the birth certificate the victim was 7 years 10 months and thus fell within the bracket of 11 years and below as required by Section 8 (2) of the SOA. Furthermore, the learned Judge found, the defect in the charge was curable under Section 382 of the *Criminal Procedure Code* which provided that no finding shall be reversed on appeal on account of an irregularity in the charge, unless it caused injustice to the accused, which she found was not the case.

8. The learned Judge considered the rest of the grounds together under one head, evidence of the prosecution case, finding them related. After analyzing the evidence by both sides, the learned Judge

found that the prosecution case was watertight. She found that the mother of the complainant caught the appellant red handed having sex with the complainant, who was at the time crying in pain. That the appellant placed himself at the scene of the incident, when he admitted that he was found in the company of the complainant. In his defence the appellant contested the date of the incident, urging it was not proved in evidence, however, the learned Judge found that the medical evidence confirmed the defilement and the date it occurred. The Judge found that the incident was in broad day light and there was no need for the police to conduct an identification parade. On the sentence, the learned Judge found that the same was legal as prescribed under Section 8 (2) of the SOA irrespective of the fact the appellant was a first offender.

9. The appellant was aggrieved by the judgment of the first appellate Court and therefore filed this appeal. He has four grounds of appeal in his supplementary grounds which he relied on, where he faults the Learned Judge for failing to:

   a. Appreciate that the prosecution failed to discharge its burden therefore prejudiced the appellant;

   b. Appreciate that the appellant did not cross- examine PW1;

   c. That the trial magistrate failed to comply with Section 200 of the *Criminal Procedure Code*, thus he suffered prejudice;

   d. To find that the sentence imposed was harsh and excessive.

10. The role of the second appellate court was succinctly set out in *Karani vs. R* [2010] 1 KLR 73 wherein this Court expressed itself as follows: -

> " 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."

11. We are also guided by the decision in *Adan Muraguri Mungara v R* CA Cr App No 347 of 2007 where it was held thus:

> " As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by 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."

12. We heard the appeal virtually on the November 16, 2022. The appellant was present from Shimo la Tewa prison, while learned Senior Principal Prosecution Counsel Mr. Jami Yamina represented the State. The appellant relied on his written submissions and chose not to highlight them. Learned counsel Mr. Jami adopted his written submissions and then highlighted one area that was concerning the effect of the appellant not having cross-examined the complainant to the prosecution case.

13. The appellant's first ground of appeal was that the learned Judge of the High Court erred for failing to find that the prosecution did not discharge its duty. In his written submissions, the appellant urged

that the prosecution did not make full disclosure of the evidence it intended to rely upon in the case against him before trial commenced, thus violating his constitutional right to fair trial under Article 50 (2) j and right to have time and facilitation to prepare for his trial.

14. The issue of whether the prosecution provided witness statements and other evidence it intended to rely on before the trial commenced is a matter of fact. A matter of fact does not fall for determination by a second appellate Court unless it is shown that the Courts below failed to consider an important matter, or where it took into account a matter it ought not to have considered. The appellant did not substantiate the allegation. Nevertheless, we note from the trial proceedings at the time of commencement of the trial on September 30, 2015, the appellant informed the Court that he was ready to proceed with the trial. He raised no issue regarding disclosure of evidence; neither did he seek more time to prepare for his case.

15. The appellant took issue with the fact he did not cross examine the complainant, PW2.He urged that he was not given an opportunity to cross examine PW2 as the case was adjourned soon after she gave her evidence in chief. On the resumed hearing, the Court proceeded to hear other witnesses after which the prosecution case was closed. He urges that he suffered prejudice as he was denied an opportunity to test the veracity and accuracy of PW2's evidence.

16. Mr. Jami, in his submissions admitted that indeed PW2 was not cross-examined. He offered an explanation that it was because the learned trial Magistrate ruled that PW2 did not understand the meaning of an oath and that her statement was unsworn. Counsel urged that no prejudice has been occasioned to the appellant because there was other evidence from PW1 who found the appellant in the very act of defiling the complainant.

17. We have considered this ground of appeal. PW2 was not cross- examined by the appellant, and contrary to what learned counsel for the State submitted, no mention was made why that was not done. Section 146 of the *Evidence Act* guides on the order and direction of examinations of witnesses at the trial. It provides that witnesses will first be examined–in-chief and, if the adverse party so desires, cross-examined. There is no provision in the *Evidence Act* that prohibits cross- examination of witnesses who have not given evidence on oath. The only exemption to that rule is the procedural law on the taking of defence evidence at a criminal trial under Section 211 (1) of the Criminal Procedure Code, which provides as follows:

> "Defence
>
> 211
>
> (1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)." (emphasis added).

18. We have confirmed from the proceedings that the learned trial Magistrate carried out a voire dire examination of PW2 and noted that although she was intelligent and clear in her mind as to the happenings around her environment, she did not seem to appreciate the importance of swearing and the solemnity of the exercise. He declared that she would give an unsworn evidence. After examination-in-chief, the learned trial Magistrate adjourned the matter, and in the subsequent proceedings, did not re-call PW2 for cross-examination.

19. The issue is whether the appellant suffered any prejudice out of that omission. Prejudice would arise if the appellant was convicted based on no evidence. We are aware of the provisions of Section 124 of the *Evidence Act*, even though it is not directly on point. The effect of the proviso to section 124 is to create, in cases of sexual offences, an exception to the general rule, that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years.

20. We considered the entire evidence adduced in this case. We find that the prosecution had two eyewitnesses of the offence, PW2 who is the complainant, and PW1 her mother. PW1 found the appellant on top of PW2 in the very act of sex. Even if PW2's evidence was to be disregarded all together, we are satisfied beyond any reasonable doubt that the evidence of PW1 was sufficient to found a conviction.

21. The other complaint raised was concerning the take-over of the trial by the learned trial Magistrate, Hon. Njagi, from Hon. Orenge, who started the trial. The appellant urged that the answer the appellant gave to the Court could safely be taken to mean that the appellant chose to have the succeeding magistrate proceed with the trial from the point it had reached. The appellant urged that the learned trial Magistrate did not address the appellant's right to re-call witnesses pursuant to Section 200 (3) of the*CPC*. For that proposition, the appellant relied on two cases of *Abdi Adan Mohamed vs. Republic* 2017 eKLA; and *Ndegwa vs. Republic* [1985] KLR 534.

22. The record shows that the trial Magistrate, Hon. Njagi recorded thus:

> " S. 200 of*CPC* explained to the accused as to rights he as in regard of he part heard case before Hon. Orenge, SRMand the accused replies:
>
> Accused:
>
> I would wish to proceed from where the case reached. Court:
>
> Case taken over by this court under section 200 (3) of the *CPC*. Case to proceed from where it reached."

23. The appellant admits that the trial Magistrate explained to him the provisions of Section 200 of the *CPC*. He also admits that he chose to have the case proceed from where the previous Magistrate had reached. The record of the proceedings attests to what the appellant said.

24. Section 200(3) of the *Criminal Procedure Code* Provides:

> " 200.
>
> (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may. -

a. deliver a judgment that has been written and signed but not delivered by his predecessor; or

b. where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."

25. Section 200(3) of *C.P.C*. gives an accused person an opportunity to choose how a matter taken over from another trial Magistrate or Judge will proceed. The accused can make one of three options under this sub-section. The accused could opt to have the case start de-novo, which means the case will be heard afresh. He could opt to have the matter proceed from where the preceding magistrate left off. Thirdly, the accused could choose to have some witnesses re-called for further cross-examination, in which case the witness is cross- examined without first being examined in chief. The accused could opt for a high breed, re-call some witnesses to give evidence afresh; re-call for further cross-examination, as he may require. This Section makes it mandatory for a succeeding Magistrate to inform the accused person of his right and options available to him under that Section. Failure to inform the accused person of his rights under that Section renders the subsequent proceedings in appropriate cases a nullity, subject to the accused challenging the proceedings for such an order to be made.

26. In this regard, considering the proceedings of the trial Court, the trial Magistrate was intentional in explaining to the appellant his rights in compliance with the legal provision, in particular Section 200 (3) of the *CPC*. The appellant's response after his rights were explained to him shows that he understood that he had an election to make as to the future conduct of the case. His option to have it continued from where it was left off leaves us in doubt that the appellant understood his rights, and gave an informed response in exercise of his rights thereunder. We see no reason to find otherwise.

27. The last challenge the appellant has raised is regarding the sentence. The appellant urged that Section 8 (2) of the *SOA*, under which he was sentenced, prescribe for a mandatory sentence. He urged that even though the trial Magistrate stated that he considered his mitigation of being a widower and with four children, the Magistrate did not exercise any discretion on the sentence in view of his belief he had no powers to give any other sentence, the same as the High Court.

28. The learned trial Magistrate after receiving the appellant's previous criminal record, which was clean; and after considering his personal circumstances found

a. The accused is 54 years old. He should have known what he did was all wrong as the child he defiled was only 8 years old.

b. The accused has caused trauma to the young child and the child shall suffer for the rest of her life.

In view of the above, this court is of the humble view that a custodial sentence is called for. The accused shall be sentenced to life imprisonment..."

29. The learned Judge of the High Court, after considering the appellant's and the States submissions on the issue of sentence held"

> " This Court agrees with the State that Section 8 (2) of the *SOA* under which the appellant was convicted as PW1 was only 7 years going on to 8 years, provides for only one mandatory sentence, life imprisonment. It does not give room for mitigation such as the person being a first offender, because it is a minimum sentence."

30. Sentencing is a discretion of the trial Court. It is also a matter of fact. The second appellate Court cannot interfere with that exercise of discretion unless it is shown that the Court passed an illegal sentence. The only challenge raised by the appellant is that his mitigation was not considered. The learned trial Magistrate took into account the appellant's mitigating circumstances as given by him. As required by law, the learned trial Magistrate also considered the victim, the age and the trauma caused, and found she would suffer for the rest of her life from that experience. It was his view that the mandatory sentence was called for, considering all circumstances. The first appellate Court did not interfere but upheld the sentence imposed by the trial Court. We find no reason to interfere.

31. We have concluded that the appellant's appeal has no merit and the same is dismissed. The conviction is upheld and the sentence confirmed.

32. Those are the orders of the Court.

DATED AND DELIVERED IN MOMBASA THIS 26TH DAY OF MAY 2023.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR