Maina v Republic (Criminal Appeal 55 of 2020)
[2023] KECA 555 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 555 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 55 OF 2020

MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA

MAY 12, 2023

BETWEEN

DANIEL GITAU MAINA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kiambu (Mumbi Ngugi, J.) dated 20th December, 2018 in HC. CR. A. No. 41 of 2018)

JUDGMENT

1. This is a second appeal from the Judgment of the Chief Magistrates Court at Thika where the appellant, Daniel Gitau Maina, was convicted on the main count of defilement of a girl contrary to section 8 (1) (3) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on diverse dates of 6th and 7th March, 2014 at a place named in the charge sheet he used his genital organ namely penis to penetrate the vagina of a girl, DMN, aged 15 years. A trial took place where the prosecution called 5 witnesses; the trial court found that there was a case to answer; the appellant in defence denied the charge but was nonetheless convicted and sentenced to 20 years imprisonment. An appeal to the High Court of Kenya at Kiambu was dismissed in a Judgment delivered on December 20, 2018 by Meoli, J. on behalf of Mumbi Ngugi, J. (as she then was). Being a second appeal our mandate is limited to a consideration of issues of law only as provided by section 361 (1) (a) *Criminal Procedure Code* which provision has been the subject of many judicial pronouncements in such cases as *Stephen M'Irungi & another v Republic* [1982-88] 1 KAR 360 where it was stated of that mandate:

> Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no

reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

2. We visit the facts of the case purely to satisfy ourselves whether the two courts carried out their mandate as required in law and whether there are legal issues raised in this appeal that would call for our consideration.

3. The prosecution case was simple and straightforward. DMN, who testified as PW1, was a girl aged 15 years and a pupil at a local school. She testified that she would wear her school uniform, leave home but instead of going to school she would go to the appellant's house where they would engage in sexual activity, action which she did willingly. At the material time she over-engaged by staying at his house for 3 or 4 days which worried her mother (MNG – PW2) and grandmother (EW – PW3) who mounted a search and found her at the appellant's house. She was taken to hospital and the appellant was arrested. The appellant found no need to cross-examine the girl and her mother. In cross- examination of the grandmother, in whose home the girl resided, she stated that the girl escaped from home for 3 days and they found her at the appellant's house on the 4th day.

4. Corporal Lucy Waithera was attached to Makuyu Police Station at the material time. She received report of defilement and escorted the girl and the appellant to Makuyu dispensary for examination. She issued P3 form which was filled by Charles Kamau Kamotho a Clinical Officer at Maragua sub-county hospital. He examined the girl and found a broken hymen, broken by past sexual activity; she had been sexually active.

5. That was the prosecution case.

6. In unsworn testimony the appellant, a conductor at a matatu terminus, denied committing the offence and narrated how he had done his usual work and was surprised to be arrested for an offence he knew nothing about.

7. As we have seen the appellant was convicted and sentenced and his first appeal dismissed.

8. The appellant raises 2 grounds of appeal in the Memorandum of Appeal drawn by his lawyers M/S Kamau Mwangi & Company Advocates. He says that the Judge of the High Court on first appeal erred in law on the interpretation and applicability of article 50 (2) (j) of the *Constitution of Kenya, 2010* and, secondly, that the Judge erred in interpretation and applicability of section 8 (1) and (3) of *Sexual Offences Act*.

9. Article 50 of the *Constitution* is a general provision on the right to a fair hearing where every person has the right to have any dispute resolved in a fair and public hearing. That person has the right under sub-article (j) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. We understand the appellant to be complaining that he was not availed witness statements before the hearing of the case started. The record shows that the appellant applied for witness statements, a request that was granted by the trial court. On first appeal this is how the Judge dealt with this issue at paragraphs 47-50 (inclusive) of the Judgment:

    47. The question is whether, in this case, the record indicates that there was such failure by the prosecution to supply the appellant with statements. I note from the record that the court made an order that the appellant should be supplied with witness statements on the day the appellant took plea. Thereafter, the appellant indicated on all but one occasion that he was ready to proceed. On July 11, 2017, just before the prosecution proceeded with the evidence of the doctor and the investigating officer, the appellant stated that "I pray for P3. I was not

given." The court then placed the file aside to allow the prosecution trace the P3. The P3 was then a vailed to the appellant, who said:

> "I have received the P3. I pray for time to look at it and be able to proceed with the doctor. Am ready to proceed with the investigating officer today."

48. From the proceedings above, I am inclined to agree with the submissions of counsel for the state that the complaint that the appellant was not given witness statements is an afterthought. He was very clear about the document he had not been given, the P3 form, and that he needed time to go through it and cross-examine the witness. He was equally clear that he was ready to proceed with the evidence of the investigating officer. Had it been true that he had not received the witness statements, he was quite capable of demanding that they be supplied to him, to enable him proceed.

49. In *Hadson Ali Mwachongo v Republic* (2016) eKLR, in which a similar challenge to the conviction of the appellant on the basis that his right to a fair hearing had been violated by failure to supply him with statements, the Court of Appeal sitting in Malindi observed as follows:

> "We are equally satisfied that the appellant's constitutional right to a fair trial was not violated. The record does not indicate the appellant raising any issue pertaining to access to witness statements. On the contrary, he is recorded informing the court that he was ready for the hearing of the case. When he was put on his defence (on) April 18, 2011, he informed the court that he was ready for his defence but later stated that he needed to be provided with "the charge". The trial court adjourned the proceedings and directed that the proceedings be typed and supplied to the appellant. On June 3, 2011the record shows that the court noted that the typed proceedings were ready and directed that the appellant be supplied with copies in readiness for hearing of his defence on July 8, 2011. On the latter date the appellant indicated that he was ready for the hearing of his defence. In short, the appellant's complaint regarding denial of access to witness statements is simply not borne out by the record. As this court stated in *Francis Macharia Gichangi & 3 others v Republic*, Cr App No 11 of 2004 it is to be reasonably expected that an accused person who claims that his or her trial rights have been violated will at the very best raise the issue with the trial court."

50. I am satisfied in this case that there was no denial of the appellant's right to a fair hearing guaranteed under article 50 (2) (j). An order was made for him to be supplied with statements. He was always ready to proceed after that. He demanded to be supplied with the P3 form and for time to prepare for the taking of the evidence of the doctor. Had he not been supplied with the statements, I can see no reason why he did not raise the issue. I accordingly find no merit in this ground of appeal."

10. We are satisfied, like the Judge on first appeal, that there was no breach at all of the appellant's fair trial rights. He was given the documents he requested and he indicated to the trial court that he was ready to proceed with the trial from beginning to end. This complaint has no merit and is dismissed.

11. Section 8 (1) of the *Sexual Offences Act* defines the offence of defilement while section 8 (3) of the Act provides the punishment to be imposed on a person who defiles a child aged between twelve and fifteen years. That person shall, upon conviction, be sentenced to an imprisonment term of 20 years.

12. It was proved beyond reasonable doubt that the appellant defiled the girl who was aged 15 years. The complaint regarding the provisions of the *Sexual Offences Act* has no merit and is dismissed.

13. There is no merit in this appeal which we dismiss in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR