Bashora v Republic (Criminal Appeal 10 of 2020)
[2023] KECA 767 (KLR) (23 June 2023) (Judgment)

Neutral citation: [2023] KECA 767 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 10 OF 2020

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

JUNE 23, 2023

BETWEEN

PAUL BAJILA BASHORA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence of the High Court of Kenya at Malindi delivered on 2nd January, 2020 in Criminal Appeal No. 30 of 2019 Originally Malindi CM Criminal Case No. 3 of 2017)

JUDGMENT

1. This is a second appeal by the appellant, Paul Bajila Bashora. Being a second appeal, our mandate is limited under section 361 of the *Criminal Procedure Code* to consideration of matters of law only. The role of this court was in this regard set out in *Karani v R* (2010) 1 KLR 73 as follows:

> " .... By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior court on fact 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 matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law."

2. The appellant was charged before the Chief Magistrates Court at Malindi in CMCC No 3 of 2019 for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* (hereinafter SOA). The particulars of the charge were that on the September 14, 2016 in Magarini sub-county within Kilifi county caused his penis to penetrate into the vagina of DK a child aged 16 years. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the SOA.

3. The appellant pleaded not guilty to the charge. The prosecution called six witnesses while the appellant gave an unsworn statement and called no witness in his defence. On November 16, 2018 the learned trial magistrate, after considering the entire evidence adduced before the court found the appellant guilty of the charge of defilement and sentenced him to serve 20 years imprisonment. On appeal to the High Court the learned judge (Mativo J. as he then was), on January 2, 2020 upheld both the conviction and sentence by the trial court.

4. Aggrieved, the appellant lodged this appeal. The grounds of appeal are contained in the record of appeal and the supplementary grounds of appeal filed on November 10, 2020. The grounds raised were:

    i. That *voire dire* examination was not conducted on the complainant to verify whether she understood the nature of the oath before proceeding with the trial;

    ii. That the ingredients of defilement were not proved to the standard required in criminal law;

    iii. That the prosecution did not discharge its burden;

    iv. That the two courts below erred in upholding the conviction and sentence without observing that the appellant was not accorded a right to a fair trial guaranteed by article 25 (c) of the *Constitution*, thus leading to a miscarriage of justice;

    v. That the two courts below erred by erroneously evaluating the prosecution evidence and failing to observe the inconsistencies in the Prosecution case reaching an erroneous conclusion; and,

    vi. That the sentence was not consistent to the charges proved against him.

5. The appeal was heard on the virtual platform of this court on the January 24, 2023. The appellant who was in person joined virtually from Shimo La Tewa Prison. Learned prosecution counsel Mr Mwangi Kamau held brief for learned prosecution counsel Mr Edgar Mulamula for the state. The appellant relied entirely on his supplementary grounds and written submissions that were filed on November 10, 2022. He did not wish to highlight them. Mr Kamau on his part relied entirely on the written submissions filed by Mr Mulamula dated January 8, 2023, and did not wish to highlight the same.

6. It is important to give a summary of the prosecution case and the appellant's defence. The prosecution case was that DAM, PW1, the complainant in this case and her sister MK, PW2 were walking together on the road on the September 14, 2016 when they met their cousin, one Z who asked them to go by one, K's home after they finished their chores. K was also their cousin. They went to his place as requested by Z and found him seated with the appellant and another man. K introduced the two men to them and told them that they were looking for girls to marry. Both girls, PW1 and PW2 were categorical that as they were interested in learning, they did not wish to be married. According to both girls, the two men later found them where they were collecting firewood and they repeated what they had told them earlier.

7. It was the evidence of the PW1 and PW2 that that night, the appellant and the other man went to their home where they were sleeping with four younger siblings and carried them away in a motor bike. That their house had no doors and access was easy. That PW1 was taken to a bush where the appellant defiled her, while PW2 was taken to a house where the other man defiled her. The two victims were released to return to their home the next morning.

8. In the meantime, PW3 AM, the father of the complainant and MK, (the two victims) received a report from his wife KM that PW1 and PW2 were not at home that night. It was 11pm. He explained that he reported to PW4, a village elder and both of them followed motorbike tracks from his home to Chemeri village where the tracks ended. The next morning PW1 and PW2 returned home. He said that PW1 reported that the appellant had defiled her, while PW2 reported that the other man whose name she and PW1 did not know defiled her.

9. The matter was reported to police and the victims taken to hospital where they were examined and treated. PW5, the Clinician examined both victims and produced treatment notes, P3 forms and age assessment as P Exhs 1, 5 and 6 in respect to PW2. In respect to PW1 he produced treatment notes, age assessment and P3 form as P Exhs 2, 3 and 7. For DAM he assessed her age as 16 years and MK as 14 years old.

10. The appellant in his unsworn defence told the court that he was not at the scene of incident. He said that in 2016 he was working in Malindi and did not travel home until weekends. He said that on January 30, 2017 he was travelling home when police stopped him at Sabaki bridge and arrested him for the offence. He denied the charges.

11. The learned trial magistrate, after analyzing the evidence found that the prosecution had proved the ingredients of the offence identified as proof victim was a child, penetration and identity of the perpetrator as the appellant. The learned trial magistrate was satisfied that penetration was proved, and the presence of spermatozoa and the broken hymen corroborated the complainant's evidence.

    The trial magistrate found the appellant was well known to PW1 and PW2 before the incident and therefore his identity as the perpetrator of the offence was proved.

12. On the first appeal the appellant faulted the trial court for convicting him yet the complainant's age was not proved, the medical evidence relied upon was shoddy and inconsistent, and that the case was not proved to the required standard.

13. The learned judge of the High Court relying on the case of *John Cardon Wagner v Republic* Nairobi HCCA No 404 of 2009, and *Musyoka Mwakari v Republic* HCCA No 172 of 2012 found that the age of the complainant was proved by the Clinical Officer's age assessment report that showed her age as 16 years. On the issue raised by the appellant that the medical evidence was shoddy and inconsistent on the basis that while the Clinical Officer examined the complainant at Malindi Hospital, the P3 form originated from Marafa Clinic, the learned Judge did not find that the treatment of the complainant at a dispensary and examination and filing of the P3 form at a hospital were an inconsistency or disparity in the evidence.

14. On the issue of proof of the complainant's age, the appellant urged that given inconsistencies in the charge sheet where it was indicated that the complainant's age was 16 years and the Clinician's report that assessed her age as 14 years, then age was not proved.

15. The learned judge found that the fact the complainant suffered a broken hymen not accompanied by injuries was not an inconsistency as the evidence of the broken hymen was geared towards proof of penetration and not injuries.

16. On the burden of proof, the learned judge found that the failure to call crucial witnesses was an issue the appellant raised in submissions for the first time and was therefore an afterthought. He was satisfied that all the ingredients of the offence charged were proved, that is, the complainant's age was proved, penetration was proved and the appellant identified as the perpetrator of the offence.

17. Before us, the appellant, relying on the definition of 'child' under the *Children Act* and the SOA, faulted the trial court of failure to conduct a voire dire examination on the complainant who was a child of tender age, being under 18 years of age.

The appellant relied on section 19 of the *Oaths and Statutory Declarations Act* and the case of Peter Kariga Kiumi v Rep (citation not provided) for the proposition that where the court receives evidence of a child, there was need to form an opinion whether she was intelligent enough to testify. That where the child was not intelligent enough, then corroboration of her evidence would be required to convict.

18. The state did not address this issue in its submissions. We note that this was not an issue raised before the first appellate court. Nonetheless, we have examined the record of proceedings of the trial court and find that the learned trial magistrate did not conduct voire dire examination of PW1. The pertinent question to ask is whether it was necessary for a voire dire examination to be conducted in this case? The complainant in this case relied on the age assessment report by PW5, P Exh 1 which indicated that she was aged 16 years old. Before taking her evidence, the learned trial magistrate noted as follows:

> " Prosecutor:
>
> My next witness is 16 years old. I request the court to examine her.
>
> Court-
>
> I have examined the 16 year old minor who is sufficiently intelligent for her evidence to be taken. She is vocal and understands the meaning of oath. She will testify on oath."

19. In *Maripett Loonkomok v Republic* [2016] eKLR this court cited the case of *Kibageny Arap Kolil v Republic* 1959 EA 92 in upholding the position that "a child of tender years" meant a child "under the age of 14 years". Moreover, in *Odhiambo v Republic* (criminal appeal 85 of 2016) [2022] KECA 1082 (KLR) (7 October 2022) this court dispelled the notion that *voire dire* examination is required for witnesses under the age of 18.

The court stated:

> "...the trial magistrate decided to conduct a voir dire examination of the complainant "because she appeared to be below 18 years old." This was a misapprehension of the law, as voir dire is required only when the proposed witness is a child of tender years so as to establish the competence of the witness' to testify intelligibly and to establish whether she understands the nature of an oath and the obligation to tell the truth. A child of tender years is, in the absence of special circumstances, one of an age or apparent age of 14 years and below."

20. The legal position is that *voire dire* examination is required only for children who are below the age or apparent age of 14 years. The complainant in this case was above 14 years and the learned trial magistrate was right in deciding not to carry out a voire dire examination, save for satisfying herself that the child was intelligent and capable of giving evidence. Nothing turns on this ground.

21. He challenged the identity of the victim, urging that since the names given in the charge sheet and in evidence were DAM, which were different from the name of the victim examined by the Clinician, PW5 as indicated in his evidence and the report as MK, the prosecution had not proved the charge against him.

22. The State did not make any submissions on this issue. We have considered the judgement of the first appellate court. On the issue of the age, he found that there were two documents speaking to the

complainant's age. The age assessment report and the P3 form, P Exhs 1 and 3 respectively, and stated thus:

> "I am unable to uphold the argument that age was not proved for two reasons. There is on record evidence by the Clinical Officer who produced the age assessment report showing the complainant's age was 16 years. The P3 form and the treatment cards were also produced showing the age as 14 years."

23. Before us, the appellant brought in another angle urging that since two different ages are given in the two reports on one hand and the charge sheet on the other, that cannot be considered to be proof of the complainant's age.

24. We wish to comment on the learned judge's finding about PW1's age. There were two victims in this case PW1 who was DAM, and PW2 who was MK. The appellant was charged for defiling PW1. The man that defiled PW2 was not before the trial court, at least not in this case. PW5 examined both victims and produced their age assessment reports, treatment notes and P3 forms. In respect of DAM, the reports in her regard were treatment notes, P. Exh. 2, age assessment P. Exh.3 and P3 form P. Exh. 7. These reports are consistent that PW1's age was assessed as 16 years. For PW2 the reports concerning her were Exh. 1, 5 and 6 which were the treatment notes, P3 form and age assessment respectively. Her age was assessed as 14 years. We think that the learned judge mixed the various reports on the victims, PW1 and PW2, and made an error when he concluded that PW1's age was assessed as 16 years in the age assessment report and 14 years in the treatment notes and the P3 forms. The appellant suffered from the same confusion, as there is no disparity between the age given in the charge sheet and in the various reports filled and produced in court by PW5. The learned judge's finding and the appellant's submissions on the evidence in regard to PW1's age is not in consonance with the record of proceedings. In the circumstances, we find that nothing turns on this point.

25. Regarding penetration the appellant urged that the trial court considered the ingredients of the offence of defilement as 'broken hymen and presence of spermatozoa' on the complainant and found it proved, while the two factors considered does not constitute the offence. He urged that as there was no discharge, bloodstains and fresh injuries found on the complainant, accompanied by lack of an explanation by the complainant of what actually happened in the act of sex, penetration was not proved. He placed reliance on the ingredients for the charge of defilement as set out in the case of *Arthur Mshila Manga v Rep* (2014) eKLR. The learned judge considered this issue.

26. We agree with his reasoning that the prosecution was relying on the Clinician's finding that the complainant suffered a broken hymen, as corroboration that there was penetration and lack of other injuries was not an inconsistency in the prosecution case.

27. On identification, it was submitted by the appellant that despite the complainant stating that the appellant lives in the same village, she could not mention the three names of the appellant. The appellant asserted that an identification parade was necessary but none was conducted at the police station. To the appellant, the failure amounted to an infringement of his right to fair trial envisaged under article 25(c) of the *Constitution*. Both the trial court and the first appellate court were satisfied that the appellant was known to PW1 before the incident and that his identification as the perpetrator of the offence was beyond reproach. This court has stated in many previous decisions that, it will not interfere with concurrent findings of fact by the two courts below unless it is found that the findings were based on no evidence, or are based on misapprehension of the evidence, or the two courts below are shown to have demonstrably acted on wrong principles in arriving at those findings. See *Chemagong v Republic* [1984] KLR 611 and *Kiarie v Republic* [1964] KLR 739. In this case,there is no basis laid before us to justify interference with the concurrent finding of the two courts below.

28. The appellant urged that the learned judge of the High Court did not properly construe the meaning of the phrase 'shall be liable' under section 8(4) of the *Sexual Offences Act*, which he urged is permissive leaving the court with the discretion to impose a lesser penalty. Lastly, the appellant has asked this court that if the conviction is upheld to take into account his mitigation. He urged that the mandatory sentence provided for under section 8(4) of the SOA conflicts, contradicts and contravenes sections 216 and 329 of the *Criminal Procedure Code* and is in breach of article 27(1),(2) and (4) of the *CoK*. The appellant assert that the sentence imposed was not consistent with the charges preferred against him.

29. The prosecution counsel, in response submitted that the first appellate court evaluated the evidence adduced before the trial court properly hence reaching a safe conviction. The prosecution asserted that imposing the mandatory minimum sentence prescribed under section 8(4) of the *Sexual Offences Act* does not contravene the provisions of section 216 and 329 of the *Criminal Procedure Code*. The prosecution has placed reliance on the directions of the Supreme Court in Muruatetu(2) case that the issue of mandatory sentences being unconstitutional would not apply to sexual offences but only murder charge hence the appellant's ground of appeal is misinformed. It is submitted that the sentence of 20 years imprisonment was within the law as section 8(4) of the Act prescribes a minimum of 15 years imprisonment.

30. The circumstances under which this court, and any appellate court for that matter, interferes with the exercise of the discretion by the trial court in imposing a sentence were restated by this court in *Bernard Kimani Gacheru v R* [2002] eKLR as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. The position was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola S/o Owoura v Reginum* (1954) 21 270 as follows:-
>
> > 'The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in *James v R*, (1950) 18 EACA 147:
> >
> > > " "It is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R v Sher shewky*, (1912) C.C.A. 28 TLR 364."'
>
> Ogola s/o Owoura's case has been accepted and followed by this court and the High Court on matters of sentence for many years. What was stated there still remains good law to-date...

> In the appeal before us, the learned trial judge made comprehensive notes on sentence. He took into account everything that was urged before him by the appellant's advocate. He did not disregard any material factor, nor did he take into account any matter immaterial. Similarly he did not act on any wrong principle. The very same matters that the appellant urged before us were urged before the learned trial judge and he took all of them into account...The sentence was entirely in the discretion of the learned trial judge and we are satisfied that he exercised that discretion properly and on the facts before him. The sentence he gave was well deserved and was not manifestly excessive. We have found absolutely no reason to interfere with it and for these reasons, we order this appeal to be and is hereby dismissed in its entirety."

31. In this case, the appellant was liable to be sentenced to imprisonment for a period of not less than 15 years. The learned trial magistrate, after considering the appellant's mitigation, the circumstances of the offence, the victim impact statement and the prevalence of the offence sentenced the appellant to 20 years. The first appellate court upheld the sentence, finding no basis on which to interfere. We too find no basis upon which to interfere with the sentence.

32. The irresistible conclusion we reach is that the appeal fails, both against the conviction and sentence, and the same is dismissed in its entirety.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JUNE 2023.

P. NYAMWEYA

.....

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