Kajembe v Republic (Criminal Appeal 21 of 2021)
[2023] KECA 769 (KLR) (23 June 2023) (Judgment)

Neutral citation: [2023] KECA 769 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 21 OF 2021

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

JUNE 23, 2023

BETWEEN

ANTHONY AMIN KAJEMBE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment and sentence of the High Court of Kenya at Malindi, by. RW. Korir, J. dated 11th April 2019 and delivered by R.Nyakundi, J. on 28th May 2019inCriminal Appeal No.4 of 2017)

JUDGMENT

1. Anthony Amin Kajembe, hereinafter the Appellant faced the charge of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*, 2006,[hereinafter SOA]. The particulars of the charge:

> "On 14th April, 2014 in Malindi Sub- County within Kilifi County, intentionally and unlawfully caused his male genital organ, namely penis to penetrate the female genital organ namely vagina of MKS a girl aged 16 and a half years old."

2. The Appellant also faced an alternative, committing an indecent act with a child contrary to Section 11(a) of the *SOA*.

3. This is a second appeal arising from the original conviction and sentence by the Chief Magistrate's Court at Malindi in Criminal Case No. 25 of 2014 and a first appeal from the High Court at Malindi in Criminal Appeal No. 48 of 2018. The trial court [Hon. Y. Khatambi, SRM], after conducting, a full trial found the Appellant guilty of the main count of defilement and sentenced him to 15 years imprisonment. On appeal to the High Court, [W. Korir, J as he then was] the Appellants appeal was found without merit and dismissed in its entirety.

4. Being a second appeal, our mandate is limited by Section 361(1)(a) to consider issues of law only but not matters of fact that have been tried by the first court and re-evaluated on first appeal. In *Karani v Republic* [2010] 1 KLR 73 that:-

> " 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." See also *Njoroge v Republic* [1982] KLR 388 and *Jonas Akuno O'kubasu v Republic* [2000] eKLR.

5. As to what constitutes "matters of law" in relation to this Court's jurisdiction as the second appellate court, the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others* [2014] eKLR characterized the three elements of the phrase "matters of law" thus:

> " (a) the technical element: involving the interpretation of a constitutional or statutory provision;
>
> (b) the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record; and
>
> (c) the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

6. 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."

7. It is therefore clear that on second appeal, this Court is mandated to make a finding as to whether the first appellate Court carried out its legal mandate of re-evaluating the evidence presented before the trial Court in arriving at its decision.

8. The facts of the case are that on 14th April 2014 the complainant was unwell and remained at home as she could not attend school. At about 10.00am she went outside the house to check on water, then returned to the house to take off her clothes in preparation to take a bath. Just after removing her clothes, the Appellant entered the room and threw the complainant on the sofa. That he removed his penis, loosened his boxers, lay on top her, spread her legs, and inserted his penis in the complainant's vagina. The complainant said that after threatening her with death if she reported the matter to any one, he left. The complainant immediately reported the incident to one Mama G, their neighbor, who at the time of hearing was deceased. She did not report to her father immediately due the threats by the Appellant. After attending prayers, she reported the incident to her father on 17th April 2014. The complainant and her father PW3 reported to the police at Malindi Police Station where her statement was recorded. She was referred to Malindi General Hospital, which she attended for treatment. She

identified her birth certificate, P. Exh. 1, the treatment notes, P. Exh. 2 and her P3 form P. Exh. 3. The complainant's evidence received corroboration from her kid brother PW1, who saw the Appellant leaving their room after the incident. PW1 went to the room and found the complainant in bed in tears and breathing heavily.

9. In his sworn evidence, the Appellant denied the charges and stated that on 14th April, 2014 he was away at work at the time of the alleged incident. He testified that trouble started between him and PW3 over non-payment of electricity and water bills for a period of one year. The Appellant testified that he was only three months old at the place prior to the incident. He found out that PW3 was the one responsible for making the payments.

   When he asked him about the bills, he was told that he was a newcomer. That from that day there was no peace between himself and PW3. He further told the court that on 24th May, 2014 at around 11.00pm police officers in the company of PW3 arrested him.

10. In a judgment rendered on 17th January 2017, the learned trial magistrate found that the evidence clearly indicated that the complainant was a minor aged 16 and a half years old at the time of the incident. That the minor's evidence was corroborated by medical evidence, which showed that her hymen was broken leading to the conclusion that there was penetration, and the complainant was defiled. The learned trial magistrate further observed that the complainant positively identified the Appellant and that PW1 corroborated her evidence on it. The learned trial magistrate found the Appellant's defence mere denial that did not cast any doubt on the prosecution case. The learned trial magistrate convicted the Appellant for the main count of defilement and sentenced him to serve 15 years imprisonment.

11. Dissatisfied, the Appellant filed the first appeal before the High Court against the conviction and sentence of the trial magistrate. There were four grounds of appeal. He faulted the trial court for erring in law and fact in that:

    i) Penetration was not proved;

    ii) The Court relied on the insufficient evidence of a single witness;

    iii) The Court failed to consider that the prosecution failed to prove its case beyond reasonable doubt contrary to Section 109 of the *Evidence Act*; and,

    iv) The Court rejected his defence in total yet he had no onus of proving his defence and innocence.

12. Regarding penetration the learned Judge considered the submissions of the Appellant in which he urged that the absence of hymen was not in itself evidence of penetration. The Appellant urged that the hymen could be broken accidentally by vaginal insertion of objects such as tampons and digits; by vigorous sporting activities, falling on sharp objects, riding on bicycles or surgical procedures. The learned Judge evaluated and analyzed afresh the evidence of the prosecution and defence as adduced before the trial. The learned Judge found that the trial court correctly found the complainant's testimony truthful and her evidence credible and therefore the Appellant's conviction on the strength of the complainant's evidence was safe.

13. With that, the learned Judge found that the learned trial magistrate correctly applied Section 124 of the *Evidence Act* to the case, and that she came to the correct conclusion that the prosecution evidence was sufficient, and the case proved beyond any reasonable doubt. The learned Judge also considered the Appellant's complaint that his defence was rejected without being considered. He analyzed and evaluated the evidence afresh, and gave consideration of the Appellant's defence that he was framed

due to disagreement with PW3, the complainant's father over water and electricity bills. The Judge found that the trial magistrate had carefully considered the defence and correctly rejected it. He found no basis of diferring from that finding and dismissed the appeal

14. The Appellant has now appealed before this Court and raises two grounds.

    i) That the High Court erred for upholding the conviction without considering the exhibits did not comply with Section 64 and 66 of the *Evidence Act*;

    ii) That the learned Judge erred in upholding the sentence failing to consider that the sentence emanated from Section 8(4) of the *SOA*, which is a mandatory minimum sentence that denies judicial officers their legitimate jurisdiction to exercise discretion in sentencing.

15. This appeal was heard on the 25th January 2023 through this Court's virtual platform. The Appellant was in person and joined the platform from Malindi Prison. Learned Prosecution Counsel Mr. Mwangi Kamanu held brief for Senior Principal Prosecution Counsel Mr. Robert Nyoro. The Appellant relied on the written submissions he had filed and did not wish to highlight the same. The learned Prosecution Counsel relied on the written submissions of Mr. Nyoro and did not wish to highlight them.

16. Regarding the first ground of appeal that the exhibits did not comply with Section 64 and 66 of the *Evidence Act*. Sections 64 and 66 provides:

> " 64. Proof of contents of documents.
>
> The contents of documents may be proved either by primary or by secondary evidence.
>
> '66. Secondary evidence.
>
> Secondary evidence includes—
>
> (a) certified copies given under the provisions hereinafter contained;
>
> (b) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
>
> (c) copies made from or compared with the original;
>
> (d) counterparts of documents as against the parties who did not execute them;
>
> (e) oral accounts of the contents of a document given by some person who has himself seen it."

17. We have considered the written submissions by the Appellant on this point. Section 64 of the *Evidence Act* deals with proof of contents of documents in evidence while Section 66 defines what constitutes secondary evidence, as shown above. The Appellant in his submissions does not refer to the two provisions, nor does he discuss any issues surrounding the issue of contents of documents or secondary evidence. There is no substantiation of any kind to explain why the Appellant cited these legal provisions.

18. Instead, the submissions in support of this ground challenges the concurrent findings of the two courts below on the issue of the credibility of the complainant, the proof of penetration and the strength

of the prosecution case generally. His submissions shows clearly that he was urging us to find that from the finding of the doctor after examining the complainant, it was clear she was not a virgin as the injury on the hymen was old. Further that she was not truthful because she did not tell her father about the incident early enough. These are issues of fact, which the two courts below exhaustively and meticulously considered. For instance, the learned Judge, after considering various cases cited by the Appellant and the impact of the provison to Section 124 of the *Evidence Act*, had this to say regarding the evidence:

> " The authority cited by the Appellant is no longer relevant in light of the proviso to Section 124 of the *Evidence Act* which excludes the requirement for corroboration in a criminal case involving a sexual offence where the only evidence is that of the alleged victim of the offence and the court, for reasons to be recorded in the proceedings, is satisfied that the alleged victim is telling the truth...'

19. The learned Judge of the High Court continued:

> " I have perused the evidence of PW 2 and find it consistent and in agreement with that of the other prosecution witnesses. There is nothing on record to show she was not a truthful witness. I therefor agree with the trial court's finding that the Appellant attacked and defiled the complainant as per her evidence."

20. We find no reason to differ with the concurrent findings of the two courts below on the issue of penetration and the credibility of the complainant. We also find that the two Sections cited by the Appellant had no relevance. Nothing turns on this point.

21. The second issue challenges failure by the learned Judge to consider that the sentence emanated from Section 8(4) of the *SOA*, which is a mandatory minimum sentence that denies judicial officers their legitimate jurisdiction to exercise discretion in sentencing. The Appellant cited this Court's decision in *Eliud Waweru Wambui v Rep* 2019 eKLR where the Court [Nambuye, JA, D. Musinga and Kiage, JA) stated:

> " This appeal epitomizes for the umpteenth time the unfair consequences that are inherent in an critical enforcement of the *Sexual Offences Act*, No. 3 of 2006 (the Act) and the unquestioning imposition of some of its penal provisions which could easily lead to a statute-backed purveyance of harm, prejudice and injustice, quite apart from the noble intentions of the legislation. The case poses one more time whether it is proper for courts to enforce with mindless zeal that which offends all notions of rationality and proportionality."

22. The Appellant urged that Section 8 (4) of the *SOA* that provides for a minimum sentence of 15 years imprisonment before consideration of the mitigating circumstances of an accused person was unfair. He proceeded to refer us to the proceedings of the trial court where he gave his mitigation. He also relied on this Court's judgment in *Evans Wanjala Wanyonyi v Republic* [2019] eKLR where the mandatory sentence of the Appellant for defilement of a 14-year-old girl was reduced from 20 years to 10 years.

23. The Respondent opposed any interference with the sentence on the grounds the Appellant's mitigation was considered and the trial court found that 15 years imprisonment was the most suitable sentence as there were no aggravating circumstances, and noting that it was a minimum sentence. Counsel urged us to note that the High Court did not interfere with the sentence.

24. As regards the appeal against sentence under section 361(1)(a) of the *Penal Code*, referred to above, severity of sentence is a matter of fact which cannot be considered on second appeal unless an issue of law arises therefrom.

25. We note that the Appellant did not raise the issue of sentence before the first appellate court. He is therefore raising it for the first time, which smacks of it being an afterthought. We wish to resist the temptation to consider this ground, it being on severity of sentence, but more importantly it being a new matter not raised before the High Court.

26. We find the Appellants appeal lacks in merit and we dismiss it accordingly.

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

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR