Adiya v Republic (Criminal Appeal 87 of 2021)
[2023] KECA 751 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KECA 751 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 87 OF 2021

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

JUNE 22, 2023

BETWEEN

LEVIS MABARE ADIYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Kimaru, J.) dated 16th October 2019 in HC. CR.A. No. 85 of 2017)

JUDGMENT

1. The appellant, Levis Mabare Adiya, was charged with the offence of defilement contrary to Section 8(1)(2) of the *Sexual Offences Act*, particulars being that on June 27, 2016 he defiled TMJ, a girl aged 10 years. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the said *Act*.

2. The prosecution called 6 witnesses while the appellant gave an unsworn statement and called no witnesses. At the end of the trial, the appellant was convicted of defilement and was sentenced to serve life imprisonment. He filed an appeal to the High Court of Kenya at Nairobi and in a Judgment delivered on October 16, 2019 (Kimaru, J as he then was), his conviction was affirmed but his sentence was altered to 30 years' imprisonment from the date of conviction.

3. The appellant is before us on a second appeal and our mandate on second appeals is limited by Section 361(1)(a) of the *Criminal Procedure Code* to a consideration of matters of law only. This Court stated of the said mandate in the case of *Michael Ang'ara Paul v Republic* [2021] eKLR:

> " Being a second appeal our jurisdiction is limited by Section 361(1) (a) Criminal Procedure Code where we are to consider only issues of law if any are raised in the appeal but must not go into a consideration of facts which have been tried by the trial court and re-evaluated on

first appeal unless we reach the conclusion that the findings were not backed by evidence or are based on a misapprehension of the evidence or it is shown that the two courts demonstrably acted on wrong principles in making those findings or the conclusions are perverse – Chemagong v Republic [1984] KLR 611."

3. We shall now look at the evidence adduced before the trial court to ascertain whether the two Courts rightly carried out their mandate as required by law.

4. JMI (PW1), was the child's father. He told the court that TMJ was born on June 17, 2007 and that his wife had passed away in January 2016. On June 27, 2016, he left his children in the house at 4 p.m. but received a call at 6 p.m. to return home urgently as there was a problem at home. Upon his return, he was informed that the appellant had been caught defiling the complainant in the toilet. He said that the plot has many houses which share a toilet and the appellant's house is about 30 metres away from his. The appellant had been caught in the act by one of his neighbours who had apprehended him. They wanted to lynch him. He spoke to his daughter, who told him that the appellant had defiled her. He and other neighbours took the appellant to Muthangari Police Station and then his daughter to Nairobi Womens Hospital.

5. EM (PW2), a teacher at TJM's school chanced on the scene on his way home and found a crowd which had apprehended the appellant and wanted to lynch him. He accompanied the child and her father to the said police station and to the hospital.

6. TMJ (PW3), the victim, told the Court that on the material day, her father had left them at home and when she went to the toilet, the appellant joined her there, ordered her to undress and when she refused, he forcefully removed her clothes and proceeded to defile her. She could not scream as he covered her mouth. Neighbours noticed what was happening and apprehended the appellant. Her father was called and she was taken to hospital. She said that she had known the appellant as they lived in the same plot.

7. Simon Nzaku (PW4), a Clinical Officer at Nairobi Womens Hospital produced a report regarding the child, who was examined on June 27, 2016. The child was found to have redness of the genitalia, a broken hymen and she had an infection.

8. Dr Kizzie Shako (PW5) of Nairobi Police Surgery examined the girl on June 28, 2016. Her findings were that the hymen was pale but the doctor could not carry out a thorough examination as the child was sad and anxious. She also examined the appellant but did not make any significant findings.

9. Corporal Pamela Karimi (PW6) of Muthangari Police Station was the Investigating Officer. She received the file on June 28, 2016 and escorted TMJ, her father and the appellant to Nairobi Womens Hospital. She visited the scene and found that the appellant and the child were neighbours. She charged the appellant with the offence and produced the child's birth certificate and P3 Form as well as the appellant's P3 Form into evidence.

10 The trial Court found that there was a prima facie case for the appellant to answer. In an unsworn defence the appellant told the court that on the material day he left for work at a construction site at 6 a.m. and was gone the whole day, only to be accused of the offence in the evening and he was arrested from his house, by the complainant's father, for a crime he did not commit.

11. The trial court considered the prosecution case and the defence offered and found that the case against the appellant had been proved to the required standard and convicted him. As we have seen the appellant's appeal on conviction was dismissed but the High Court interfered with the sentence.

12. The appellant has filed this second appeal. He asserts that the High Court erred in failing to find that the key ingredients of the offence were not established; that the Court did not note that there were

material inconsistencies in the prosecution case; that the Court failed to find that crucial witnesses were not called and that the Court failed to analyze the evidence and consider the defence which exonerated him from any wrong doing. In homemade written submissions, the appellant submits that the child's age was not adequately proved; that the child's name was different on the notification of birth; that penetration was not proved; that a broken hymen is not proof of penetration; that two main witnesses ie, "Mama Iso" and "Baba Tonny" were never called as identifying witnesses. He urges the Court to give him the benefit of doubt by quashing the conviction and setting aside the sentence.

13. The Office of the Director of Public Prosecutions (ODPP) filed undated submissions in opposition to the appeal. They submit that the evidence was sufficient and the case was proved beyond reasonable doubt. It is submitted that the father of the minor child and the birth certificate all confirmed the girl fell under the bracket of 11 years of age and below. It is also submitted that the appellant was known to the victim as a neighbour therefore identification was not in issue, and that the medical evidence proved that the child was defiled. It is submitted that the High Court should have maintained the sentence of life imprisonment handed down by the trial court.

14. As we earlier noted, our mandate is limited to matters of law only. This court in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR defined matters of law by saying:

> " What then is a question of law over which we have jurisdiction, as opposed to a question of fact, over which we have none? Black's Law Dictionary defines the two terms as follows:
>
> > "Matter of fact: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law: A matter involving a judicial inquiry into the applicable law."
>
> One of the best expositions on the distinction between the two is to be found in the judgment of Denning J in the English case of Bracegirdle v Oxley (2) [1947] 1 ALL ER 126 at p 130:
>
> > "The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them."

15. In our view, the matters of law arising are whether the offence was proved to the required standard; whether key witnesses were not called; whether the age of the complainant was proved and whether the appellant's defence was considered.

On whether the case was proved to the required standard and whether the High Court on first appeal re-evaluated the evidence as required by law as per the case made out by the prosecution, PW1 left his children at home, only to be called back later as an incident had occurred. TMJ (PW3), the minor,

16. told the Court how she went to the toilet and was exiting the toilet, only for the appellant to push her back into the toilet and defile her. She told the court that two neighbours came and removed them both from the toilet and there was a commotion, which was chanced upon by PW2, who found the appellant and the victim surrounded by a crowd of people who wanted to lynch the appellant. The evidence by PW2 placed the appellant at the scene with the minor despite his assertion in his defence that he was arrested in his house. The minor child was forthright in her evidence that she resisted the appellant's attempt to defile her but he did so forcefully and covered her mouth so that she could not cry out for help. Upon being seen by a Clinical Officer, PW4, it was confirmed that TMJ had redness of the vagina and a broken hymen, which indeed corroborates the evidence by TMJ that she was defiled. We also note that the appellant was known to the victim as a neighbour.

17. With regard to her age, the child's father said that she was born on June 17, 2007, which is confirmed by her church card from African Divine Church (EA) Serial No xxxxx showing date of birth as June 17, 2007. There is also Form B1 issued under the *Births and Deaths Registration Act* confirming the said date. Both documents were produced into evidence by the prosecution. The child was therefore 9 years old when she was defiled.

18. The appellant complains that the High Court did not re-evaluate the evidence and reach its own conclusion as required in law. We have gone through the record and are satisfied that the High Court re-evaluated the case as it was required to do. The High Court identified the charge which the appellant faced; it set out the evidence that was presented and the defence; it set out issues for determination and proceeded to analyze each of those issues and reached conclusions on them. There is no merit in this complaint and that ground of appeal is dismissed.

19. Then there is the issue that crucial witnesses were not called. It is true that witnesses who found the appellant in the act and those who rescued the minor (apart from the teacher) were not called. The prosecution called the minor who gave a forthright account of what happened; it called her father; it called as a witness a teacher who happened at the scene when the crowd that had gathered wanted to lynch the appellant for what he had done. Medical evidence from Nairobi Women's Hospital and from the Police Surgeon was called to support the charge of defilement and it was proved that the child was defiled. Section 143 *Evidence Act* provides that no particular number of witnesses is required to prove a fact unless there is a provision of law to the contrary. This Court while considering that provision stated in the case of *Suleiman Aziz v Republic* (2017) eKLR;

> " First, under section 143 of the *Evidence Act*, in the absence of a provision of law requiring a specific number of witnesses, no particular number is required to prove any fact. Secondly, as propounded in Bukenya v. Uganda [1972] EA 549, the proposition that the court may draw an adverse inference from the prosecution's failure to call important and readily available witnesses arises in cases where the evidence called by the prosecution is barely adequate. In Donald Majiwa Achilwa & 2 Others v. Republic, Cr. App. No 34 of 2006, this Court explained the position thus:
>
> > "The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where,

> however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case.""

20. We are satisfied that the prosecution called witnesses who proved the case of defilement to the required standard.

21. On whether the appellant's defence was considered we have gone through the record. The appellant had stated in defence that he was a construction worker and had spent the day at work in Westlands and was arrested when he returned home from work. The High Court on first appeal found that this defence had been displaced by the evidence of the complainant and that of PW1 and PW2. It found that the defence was evasive and did not dent the otherwise strong culpatory evidence adduced by the prosecution witnesses. Upon our own consideration we agree with the findings made by the first appellate Court on this issue.

22. We have found no merit in any of the grounds of appeal raised by the appellant. The appeal has no merit and we accordingly dismiss it.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR