Mbuvi v Republic (Criminal Appeal 36 of 2021)
[2023] KECA 761 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KECA 761 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 36 OF 2021

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

JUNE 22, 2023

BETWEEN

PAUL MAKAU MBUVI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Machakos (Mutende, J.) dated 19th December 2014 in HC. CR.A. No. 108 of 2010)

JUDGMENT

1. The appellant, Paul Makau Mbuvi was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on March 13, 2009 at [Particulars Withheld] sub location, Yatta District, he intentionally and unlawfully caused his penis to penetrate the vagina of NK a child aged 11 years. There was an alternative charge of indecent act with a child contrary to section 11(1) of the Act where it was alleged that on the same day and place he unlawfully and intentionally touched the vagina of the said girl using his penis.

2. Initially, he pleaded guilty to the charge, but later changed his plea to, not guilty after an age assessment report showed he was between 18 and 20 years. The prosecution called 5 witnesses, and after the trial magistrate considered the evidence, the appellant was found guilty and convicted for the offence of defilement and sentenced to life imprisonment.

3. Dissatisfied with the conviction and the sentence, the appellant appealed to the High Court which dismissed the appeal, and upheld both the conviction and the sentence.

4. Aggrieved by the decision of the High Court, the appellant appealed to this Court on grounds that: the High Court upheld the conviction and sentence but failed to appreciate that the witnesses were incompetent; failed to find that section 26 and 36 of the *Sexual Offences Act* were never adhered to; failed to find that the provisions of Article 50 (2) (g) (h) of the *Constitution* were not complied with;

failed to find that section 214 of the *Criminal Procedure Code* were not complied with, and finally, that the trial court failed to find that the plea taken was equivocal.

5. When the appeal came up for hearing, the appellant appeared from Kamiti Maximum Prison, and orally submitted that he was very young when the trial took place and that he did not appreciate the seriousness of the offence and the charges he was facing, and that he had reformed and sought leniency from the court.

6. Learned counsel for the State Mr Omondi opposed the appeal, and submitted that the prosecution had proved its case to the required standard and that the evidence adduced by the witnesses corroborated that of the complainant. It was submitted further that the appellant was properly identified, all the ingredients of defilement were taken into account and that the prosecution discharged its burden and proved that the appellant was the perpetrator.

7. Before considering the complaints raised, a brief outline of the evidence is necessary. NK PW 1, a child aged 11 years gave sworn evidence after a *voir dire* examination that on March 13, 2009 at 5.00 pm, while she was at home washing dishes outside the house, she felt someone hold her lower back. She identified the person as the appellant; that he held her hand and led her behind the house where he laid her on the ground on her back, removed her underpants and sexually assaulted her; that he kept his clothes on, but had pulled his trousers down. She stated that she felt pain and saw a watery substance come out of her vagina.

8. She further stated that FM (PW2), aged 13 years was passing by, and when the appellant saw her, he ran away. NK then got up and went to tell her mother what the appellant had done to her. She was taken to Matuu District Hospital where she was treated and the matter was thereafter reported to the police. She stated that the appellant was their neighbour and well known to her.

9. After *voir dire* examination, FM gave sworn evidence that on the material day at about 5.00 pm, she had gone to fetch water. As she approached NK's gate, she saw NK and the appellant behind the house. She was about 10 meters from where they were, and she saw the appellant who had lowered his trousers to his knees laying on top of NK whose skirt was lifted. When the appellant saw her, he released NK, zipped up his trousers and left. FM proceeded to fetch water, and later met NK's mother to whom she reported what she had seen; that Paul, the appellant had defiled NK. She stated that he was well known to her, as he was a neighbour.

10. R (PW3), is NK's mother. She heard about the incident at about 5.30 pm from FM who was at her gate; that FM had seen the appellant laying on top of NK. Upon inquiring from NK, the child told her that the appellant found her outside the house washing dishes, and dragged her to the back of the house and defiled her. When Roda examined NK' s vagina, she found a whitish fluid. She informed her husband who went in search of the appellant, and he was later arrested. NK was taken to the hospital where she was treated. In cross examination, she confirmed that there was a land dispute which was being handled by the elders but that no differences existed between them.

11. Benjamin Maingi, (PW4), a clinical officer stationed at Matuu District Hospital examined NK on March 13, 2009. He observed that her labia minora and majora were swollen, her hymen was torn with raw edges and a vaginal swab revealed no spermatozoa. He stated that he filled the P3 form and produced it together with treatment notes. He concluded that there was penetration.

12. PC Abdalla Kongani, (PW 5), the investigating officer, received the report of the defilement from NK who was accompanied by her father, that the appellant had defiled her. After booking the report, he gave them a referral note to the hospital where her P3 form was filled and later arrested the Appellant. He stated that the Appellant was also taken to the hospital for examination and was later charged.

13. In his defence, the appellant, a student, testified that on the date of the alleged incident he had gone to visit his aunt at Kithendu who had promised to buy him a new set of uniform. They had gone to have it fitted the previous day. On his way back home, he met three people who took him to Matuu police station and he was later charged with the offence. He denied committing the offence. An age assessment report assessed his age as between 18 to 20 years old.

14. We have considered the grounds of appeal as well as the submissions. This is a second appeal and this Court's mandate, is set out in section 361(1) of the *Criminal Procedure Code*, where it is specified that this Court's jurisdiction is limited to matters of law only and as for sentence, the court can only intervene where the sentence was enhanced by the first appellate court or where the sentence passed was illegal. Further, this Court ought not to dwell on factual matters, save for instances where the findings made are not supported by the evidence on record. See *Adan Muraguri Mungara vs Republic* [2010] eKLR and *David Njoroge Macharia vs Republic* [2011] eKLR.

And in the case of *Rashid vs Republic* (Criminal Appeal 90 of 2021) [2023] KECA 596 (KLR) this Court when handling a second appeal observed that

> " As already stated, this being a second appeal, this court is restricted to addressing itself to matters of law only. The court will also not normally interfere with concurrent findings of fact by the two courts below unless such findings are not based on evidence or they are based on a misapprehension of the evidence, or the courts below acted on wrong principles in making the findings."

15. In view of the stated mandate, we are of the view that the issues for consideration are;

    i. whether the Appellant's rights to a fair trial under Article 50 (2) (g) (h) of the *Constitution* were violated; and

    ii. whether the offence of defilement was proved to the required standards.

The appellant did not argue the other grounds of appeal and we will not address them.

16. Beginning with the issue of his rights having been violated, as he was not afforded legal representation as specified by Articles 50(2)(g)(h) of the *Constitution*. The provisions stipulate that:

> " 50 (2) Every accused person has the right to a fair trial, which includes the right-
>
> g. to choose, and be represented by an advocate, and to be informed of this right promptly.
>
> h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly".

A consideration of the record does not disclose that in his appeal to the High Court, the appellant raised this ground. As a consequence, there is no determination by the High Court on this issue.

17. In the case of *John Kariuki Gikonyo vs Republic* [2019] eKLR, this Court stated thus:

> "(17) ....We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court

properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in *Alfayo Gombe Okello v Republic* [2010] eKLR Criminal Appeal No 203 of 2009; held as follows:

> " .... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

(18) In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal"

18. A similar conclusion was reached by this Court in the case of *Katana & another vs Republic* [2022] KECA 1160 (KLR) thus;

> " The issue of a violation of the right to a fair trial was not raised by the appellants in their appeal before the High Court, and therefore could not be the basis for vitiating the High Court's decision."

But having said that, this Court in the case of *William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) vs Republic* [2022] KECA 23 (KLR) had occasion to determine a similar argument on this issue of legal representation.

19. There it was held that, the operative circumstances giving rise to the necessity of legal representation in criminal proceedings, are where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person and, the incapacity and inability of the accused person to participate in the trial. The court expressed that, the standard practice in every criminal trial should be for the accused person to be informed, at the outset of his right to legal representation since the *Constitution* demands it. See also the Supreme Court case of *Republic vs Karisa Chengo & 2 others* [2017] eKLR.

20. In the present appeal, the necessity of legal representation was not raised by the appellant in his appeal before the High Court, and therefore, the omission cannot be the basis for vitiating the High Court's decision. Additionally, the record of the trial court shows that the appellant indicated he was ready to proceed with the trial. He actively participated in the proceedings and cross-examined all the witnesses. As such, no basis was established for affording him legal representation, and there is nothing in the record that would disclose that he suffered a substantial injustice because he was not afforded legal representation. This ground therefore fails.

21. The next issue is whether the offence was proved to the required standard. In a case concerned with the offence of defilement, the prosecution must establish three ingredients which are; the age of the victim, penetration and identification of the perpetrator.

22. In the case of *Francis Omuroni vs Uganda*, Criminal Appeal No 2 of 2000,the Court of Appeal observed that:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

In this case, NK testified that she was 11 years old at the time of the incident. Her age was corroborated by her mother. In the circumstances,as were the two courts below, we too are satisfied that NK's age was sufficiently proved.

23. The second element is penetration. Penetration is defined under section 2 of the *Sexual Offences Act* as "...The partial or complete insertion of the genital organ of a person into the genital organs of another person."

24. NK's evidence was that the appellant took her to the back of the house, lifted her dress, lowered his trousers to his knees, lay on top of her and sexually assaulted her, and that she felt pain. FM saw the appellant lying on NK with his trousers down at his knees. And when PW 4, a clinical officer examined NK, he observed that her labia minora and majora were swollen and her hymen was torn with raw edges. He concluded that there was penetration.

25. Essentially, when the medical evidence that demonstrated that there was penetration, is considered together with NK's evidence that the appellant sexually assaulted her, and that of FM who saw the appellant in the act, the only conclusion that can be drawn is that penetration was conclusively proved.

26. Concerning the element of identification, both NK and FM stated that the appellant was a neighbour and their houses were close to each other. Clearly, he was a person who was known to them. He was therefore identified through recognition. See *Anjononi vs Republic* [1980] KLR 59. On the basis of our own reevaluation of the evidence, we are satisfied that the appellant was properly identified.

27. Consequently, the above elements having been proved beyond doubt, we are satisfied, as were the trial Court and the High Court that the offence of defilement was proved, and that, the appellant defiled NK. As such, we uphold the conviction as properly reached by both the two courts below.

28. In sum, the appeal fails in its entirety and is accordingly dismissed.

It is so ordered.

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

A.K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR