Mbathe v Republic (Criminal Appeal 69 of 2015) [2023] KECA 676 (KLR) (9 June 2023) (Judgment) (with dissent - W Karanja, JA)

Neutral citation: [2023] KECA 676 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 69 OF 2015

W KARANJA, PO KIAGE & J MOHAMMED, JJA

JUNE 9, 2023

BETWEEN

JUSTUS MUTHUI MBATHE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Embu (Muchemi, J.) dated 28th September, 2015 in HCCRA No. 28 of 2014)

JUDGMENT

1. The appellant, Justus Muthui Mbathe, was arraigned before the Senior Principal Magistrate's Court at Siakago on June 17, 2013 and charged with defilement contrary to Section 8(1) as read together with Section 8(2) of the *Sexual Offences Act* (SOA). The particulars of the offence were that on June 10, 2013 in Mbeere South District within Embu County, he intentionally caused his penis to penetrate the vagina of RK (minor) a child aged 9 years.

2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to Section 11 of the *Sexual Offences Act*.

3. During the trial the prosecution called 5 witnesses in support of its case. It was adduced that on June 10, 2013, the minor (PW2) and her 6 year old brother (PW3) had gone to fetch firewood when they met the appellant, a person who lived in their village and was known to them. The appellant approached the minor and defiled her in the presence of her brother. When the minor's mother (PW1) returned home from work in the evening, she found the minor sleeping and upon inquiring what the problem was, the minor told her that she had a headache. The following day she informed PW1 that she had been defiled by the appellant. When PW1 examined her, she found that she had a whitish substance in her vagina and she was passing urine uncontrollably. The clinical officer (PW4) who examined the minor testified that when he examined her, he found that she had mild vulval lacerations, her hymen

was perforated and she had some vaginal discharge. PW5, the investigating officer testified to PW1 reporting a defilement case at Kindaruma Police Post on June 12, 2013.

4. At the close of the prosecution case, the appellant applied for PW2 and PW3 to be recalled so that he could cross-examine them but the prosecution resisted, and the trial Magistrate rejected that application. We shall return to this issue later as it is one of the grounds of appeal. The trial Magistrate A. Makau (Ag SRM) found that the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement and called no witness. He denied the charges and claimed that on the material day he had travelled for a burial and when he returned home in the evening he was arrested by the police.

5. The learned Magistrate evaluated the evidence tendered before the court and found the appellant guilty as charged and sentenced him to life imprisonment.

6. Aggrieved by both the conviction and sentence, the appellant appealed to the High Court at Embu. Muchemi, J re-evaluated and re-analysed the evidence. She then upheld the conviction and sentence as meted against the appellant by the trial court and dismissed the appeal.

7. Dissatisfied still, the appellant has preferred this second appeal, based on a supplementary memorandum of appeal raising 6 grounds, which we summarize as that the learned judge erred by;Relying on contradictory evidence of PW1, PW2 and PW3.Failing to consider that crucial witnesses were not called to give evidence contrary to section 150(1) of the *Criminal Procedure Code*.Failing to find that no medical report was exhibited in court in support of the prosecution case.Relying on a charge sheet that was defective contrary to section 214 of the Criminal Procedure Code.Failing to consider the appellant's defence.Failing to recall PW2 and PW3 for further cross-examination by the appellant.

8. During the hearing, the appellant appeared in person while the respondent was represented by Mr Ondimu the learned Senior Principal Prosecution Counsel. Both had filed written submissions.

9. The submissions of the appellant are to the effect that, the prosecution failed to prove its case beyond reasonable doubt. The evidence of PW1, PW2 and PW3 which the trial Magistrate relied on to convict him needed corroboration from an independent witness. It is contended that the allegations of PW1 that the minor told her about the defilement incident the following day showed that the case was a frame-up as it was not possible for a 9 year old child to spend a whole night away from home without revealing such an ordeal.

10. The appellant further challenges the failure of the prosecution to call witnesses he deemed crucial such as the area chief, whom PW1 claimed to have reported the matter to, and their neighbours. He claims that no medical report was produced in court in support of PW4's evidence and neither was the P3 form served upon him, contrary to Article 50(2) of the Constitution. It is urged that the charge sheet was defective, for the reason that although it is indicated that a report of the incident was made on December 5, 2013, the particulars of the offence reveal that the incident happened on June 10, 2013.

11. The appellant faults both the trial court and the first appellate court for failing to believe his account that he was away for a burial on the material day and that he only returned home in the evening of that day. Further, he complains, the case was a set-up as PW1 held a grudge against him. The appellant contests the trial court's refusal to recall PW2 and PW3 on his request, urging that his right to fair trial pursuant to Article 50 of the Constitution was contravened. It is submitted that the first appeal ought to have been heard by two judges in accordance with section 359(1) of the Criminal Procedure Code (CPC) which stipulates that appeals from subordinate courts should be heard by two judges unless the Chief Justice or a judge whom the Chief Justice has given authority in writing, directs that the appeal

be heard by one judge of the High Court. In the end the appellant beseeches this Court to quash his conviction, set aside the sentence of life imprisonment and set him at liberty.

12. For the respondent, learned prosecution counsel MrOndimu opposes the appeal submitting that the ingredients of the offence of defilement namely, age of the complainant, penetration and positive identification of the assailant were properly proved. He argues that the age of the complainant was sufficiently proved by both her mother (PW1) and herself, in addition to her birth certificate, a copy of which was produced in evidence. Penetration was established through the minor's testimony as corroborated by PW1 and PW4, the clinical officer. Further, the appellant was well known to the minor and her brother, PW3, as they hailed from the same village and hence he was positively identified.

13. Counsel asserts that the prosecution availed all relevant witnesses to prove the charges against the appellant, and in any case there is no requirement in law for a particular number of witnesses to prove a particular fact. The claim that there existed a grudge between the appellant and the minor's mother is also resisted on grounds that PW1 was cross-examined by the appellant on the same and she categorically denied it. Counsel submits that both the trial court and the first appellate court considered the appellant's defence, as evinced by their respective judgments. Moreover, the first appellate court's finding that the charge sheet was proper and contained all the necessary ingredients is affirmed as proper. In conclusion, Mr Ondimu urges us to uphold the conviction, noting that the appellant did not challenge the sentence.

14. We have considered the record of appeal as well as the submissions made by the appellant and the respondent. We appreciate our role as the second appellate court and our jurisdiction which is limited to matters of law as defined in Section 361(1) of the Criminal Procedure Code. This was affirmed by this Court in *David Njoroge Macharia vs Republic [2011] eKLR* as follows;

> ' That being so only matters of law fall for consideration – see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see Chemagong v R [1984] KLR 611.'

14. We first deal with the procedural issue that was raised by the appellant both at the High court and before this Court, that is, the rejection by the trial court of his plea to recall PW2 and PW3 for purposes of cross-examination. To appreciate the context of this complaint, we see it fit to re-state herein below the proceedings in relevant part.

15. On January 6, 2014 when PW2, the minor, appeared before court to testify, and upon a voire dire examination being conducted, the trial Magistrate stated;

> ' She will give unsworn evidence but she will be cross- examined by the accused'.

Upon the minor completing her testimony, the appellant was asked to cross-examine the minor and he responded;

> ' I do not have any question to ask the young girl because all she has said was told to her by her mother. I cannot ask her questions'.

The same day, the 6 year old brother to the minor (PW3) also testified and once again the appellant declined to cross-examine him protesting;

> ' I do not have anything to ask the young boy because he is telling lies. He was told what to say by his mother. I cannot ask him questions.'

On February 19, 2014, when the prosecution case was closed, the appellant made an application stating;

> ' I plead with the court to be allowed to cross- examine the complainant and her brother who testified. I did not ask them when they testified.'

The prosecution counsel opposed that application contending;

> ' I vehemently oppose the accused person application to recall the witnesses because the accused was given a chance to ask questions and I remember court repeatedly asked accused if he was sure he did not have questions. Accused is attempting to delay justice and this application is an afterthought. It is expensive to bring these witnesses. Accused application is an abuse of court process since I have closed my case.'

To this the appellant responded;

> ' I was not satisfied and I do not think the court can overrule my application.'

The trial Magistrate, upon considering the application and objection to it ruled thus;

> ' The application by the accused is time barred since the pros (sic) has closed its case and allowing it will be going against the provisions of the criminal procedure code since it would re-open prosecution case when its already closed.'

Although the accused has a right to be allowed to recall witnesses for further cross-examination that right is not absolute and it is limited to the time prosecution's case is going on. The application is therefore disallowed.'

In considering this issue at the first appellate stage, the learned judge observed;

> ' On the right to cross-examination, it is apparent that PW2 and PW3 were minors and gave unsworn evidence. The evidence was not subject to cross-examination. It cannot be said that the appellant was denied the right of cross- examination in respect of the minor witnesses'.

16. We think, with respect, the learned judge fell in error in holding that the evidence of the minors was not subject to cross- examination, and that it cannot be said that the appellant was denied the right of cross-examination. Even though the appellant was initially granted an opportunity to cross-examine the minors and he declined, that refusal *per se* did not take away that right. Section 150 of the CPC is explicit that the court can summon a witness at any stage of the trial proceedings if the evidence of that person appears essential to the just decision of the case. We hold the view that, PW2 and PW3 being core witnesses in the case, the appellant should have been allowed to recall them for cross- examination, even through an intermediary, if that were necessary. It should also be borne in mind that the appellant

was acting in person, he did not have the advantage of being advised by counsel. Section 150 of the CPC provides;

> ' A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.'

17. In the result we are of the considered view that, the failure of the trial court to recall the minors for cross-examination at the plea of the appellant implicated his fair trial rights and amounted to a mistrial. In holding so we are persuaded by this Court's holding in *Gailord Yambwesa Landi vs Republic [2019]eKLR* where the Court cited with approval the decision in the case of *Nicholas Mutula Wambua Vs Republic, MSA CRA NO 373 OF 2006*, as advanced by the Supreme Court of Uganda in *Sula vsUganda [2001] 2 EA 556*. That court stated thus;

> ' The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined. It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined'.

Similarly, in *Paul Kinyanjui Kimauku vs Republic [2016] eKLR*, this Court made a comparable observation thus;

> ' (23) Again, the record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of the *Constitution*, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross- examination. Thus, there is a clear distinction between an accused person who opts under Section 211 of the Criminal Procedure Code to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross- examined.
>
> (24) We note that although the learned Judge reconsidered the evidence that was adduced before the trial court, he did not address these pertinent issues that ought to have formed the subject of his analysis of the Sentence. Had he done so, he would have no doubt found that the finding of the trial magistrate could not be sustained'.

18. Having found that there was a mistrial, it will not be useful for us to consider the other grounds of this appeal. We, however, have to determine whether to acquit the appellant or order a retrial. In arriving

at this decision, we reckon the principles governing whether or not to order retrials as restated by this Court in *Angechel Lotip vs Republic [2017] eKLR*;

> ' As to whether we should acquit the appellant or order a retrial would be dependent on the circumstances of the case. The case of Muiruri vs Republic [2003] KLR 552 outlined the principles governing whether or not a retrial should be ordered, when it was stated thus;
>
> > ' Generally whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.'

19. In this matter the appellant was arraigned in court on June 17, 2013, and although the trial court granted his plea for release on bond, it is not clear whether he was eventually released because the record shows that he applied for review of the bond terms on three occasions. While we are cognizant that this case concerns a serious offence, we think the time that has lapsed since the trial started is inordinately long, that is about 10 years. Ordering a retrial at this point in time will be prejudicial to the appellant.

20. For these reasons, we allow this appeal, quash the appellant's conviction and set aside the sentence of life imprisonment. The appellant shall be forthwith set at liberty unless otherwise lawfully held. This judgment is signed by two judges, pursuant to Rule 34(3) of the *Court of Appeal Rules*, W Karanja JA, being of a different view, having declined to append her signature.

21. Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

P. O. KIAGE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR