Banda v Republic (Criminal Appeal 26 of 2022)
[2023] KECA 986 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 986 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 26 OF 2022

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

JULY 28, 2023

BETWEEN

FREDRICK GILBERT BANDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Mombasa (D.S. Majanja J.) dated and delivered on 4th September 2018 in High Court Criminal Appeal No 53 of 2016 arising from the original trial in Kwale Criminal Case No. 361 of 2015)

JUDGMENT

1. Fredrick Gilbert Banda ('the Appellant') has challenged the dismissal of his first appeal by the High Court at Mombasa (Majanja J.). The said appeal had been lodged against his conviction for the offence of defilement and sentence to life imprisonment that had been imposed by the Senior Principal Magistrate's Court at Kwale (hereinafter 'the trial Court'). The particulars of the offence were that on March 21, 2015at [Particulars withheld] area of Ukunda township within Kwale County the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of EAO, a girl aged 9 years. In the alternative, he was charged with committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

2. The High Court (Majanja J.) in dismissing the first appeal found that PW 3 gave clear testimony on how she was sexually assaulted and the fact of penetration was corroborated by the evidence of her mother, PW 1, who saw her in a state of distress after her ordeal as she could not walk properly, and likewise, PW 2 noticed that she was not walking properly. PW 5 not only noticed that the child was walking with difficulty but noted that there were lacerations on her vaginal walls, a laceration on the anus and the hymen was absent. Additionally, PW 3 gave the same consistent narration of her ordeal to PW 1, PW 2 and PW 5. On the issue whether the appellant was the person who caused the act of penetration, he was known to PW 3 who referred to the appellant as Dei, a name confirmed by PW 1,

PW 2 and the defence witnesses, DW 2, DW 3 and DW 4. Further, the appellant is a person who lived in the same neighbourhood as PW 3 and her parent, which was confirmed by the appellant's sister, DW 4. The totality of the evidence is that the appellant was a person known to PW 3 and her family. On the final ingredient of the age of the child, that PW 2 produced the clinic card showing PW 3's date of birth, and that at the time the offence was committed, PW 3 was aged 9 years old. Therefore, that the sentence of life imprisonment was within the law and was neither harsh nor excessive to warrant interference.

3. The appellant is dissatisfied with the decision made by the High Court and proffered this appeal by way of Notice of Appeal dated September 5, 2018. We heard the appeal on this Court's virtual platform on March 13, 2023, and the appellant was present appearing virtually from Shimo La Tewa Prison and was represented by learned counsel, Mr. Jared Magolo, while the Respondent was represented by the learned Assistant Director of Public Prosecutions, Mr. Mulamula. Mr.Magolo informed us that he had abandoned the appeal on sentence, since the sentence had been reduced to 30 years' imprisonment upon the determination of MSA HC Petition No 97 of 2021 filed by theappellant petition in the High Court. Both counsels proceeded to highlight their respective submissions on the appeal against of conviction, and relied on their written submissions dated March 6, 2023and October 11, 2022.

4. In commencing our determination, we reiterate the role of this court as a second appellate court, as set out in *Karani v R* (2010) 1 KLR 73:

> " This is a second appeal. 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 appellatecourt 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."

5. The appellant had entered a plea of not guilty in the trial court, whereupon the prosecution called five (5) witnesses to testify in support of its case, while the appellant gave sworn testimony and called three (3) defence witnesses. The facts leading to the appeal as set out in the evidence adduced in the trial court are as follows. POA, who testified as PW1 stated that the victim, EO, was her daughter aged 9 years, and that on March 23, 2015, upon realizing that the daughter was walking with difficulty, EO disclosed that she was experiencing pain in her private parts, and upon examination, POA noted tenderness in EO's private parts and a white discharge. EO further explained that on March 21, 2015, a neighbour by the name Dei had called her to his home to send her, whereupon he had removed her clothes and defiled her through the vagina and anus, and gave her some money.

6. POA alerted her husband, and they reported the matter to the police station. GO, POA's husband and the victim's father, testified as PW2. He confirmed receiving the report of EO's defilement from POA, and reporting the matter to Diani Police Station, whereupon they took the victim to hospital for examination. Both POA and GO confirmed knowing Dei who was a neighbour, also known as Fredrick. The victim (EO) testified as PW3 after a voire dire examination, that on March 21, 2015 she was going to the shop when Dei called her to send her to the shop, and on reaching his house, he closed the door, removed her clothes, placed her on the bed and did bad things to her, namely by inserting his thing of urinating at her front and her back, and warned her not to shout or he would kill her. He thereupon gave her 5 shillings. She then went home and did not tell anyone, but her mother noticed that she was walking with difficulty, and she was taken to the police station where she informed them that Dei had defiled her. She also testified that Dei had previously defiled her in 2013.

7. PW4 was Corporal Emma Mutata, who confirmed that she received the report on the defilement on March 24, 2015, recorded EO's statement and arrested the appellant. PW5 was Zainab Jembe, a clinical officer at Diani Health Centre, who examined EO, noted that she was walking with difficulty and found lacerations on vaginal wall and no hymen. She produced the PW3 form as an exhibit. The appellant testified as DW1 and denied knowing EO or GO and stated that he is a driver, and that onFebruary 25, 2015he was told someone wanted to be taken to Malindi, and that the person approached him and asked him to accompany him to Diani Police station. Further, that on March 21, 2015he was at his sister's place and they attended church together. DW2 was GO's landlord, and testified that on February 25, 2015 GO asked for a driver to take guests to Diani and that he gave GO the appellant's number, and later learnt that the appellant had been arrested, DW3 and DW4, the appellant's brother-in-law and sister testified that the appellant was with them at home on the morning of March 21, 2015.

8. After analysing the above evidence, the trial court found that the prosecution had proved its case and convicted the appellant for the offence of defilement and sentenced him to life imprisonment, which conviction and sentence was upheld by the High Court. The appellant in his second appeal to this courthas faulted his conviction on three broad grounds. The first is that there was denial of legal representation and opportunity to prepare for the appeal. Mr. Magolo submitted in this respect that there was no service of the record of appeal on the appellant, and the proceedings in the record show that learned Judge directed the appellant's counsel make copies of the record and prepare within one hour. This resulted in the appellant saying nothing and caused the appellant prejudice.

9. In reply, Mr. Mulamula submitted that Mr. Magolo received the record of appeal on February 27, 2017, one year before the hearing and had sufficient time to prepare and file submissions. We find the claim that the appellant's right to legal representation and to prepare for trial was violated to be without merit, as the record shows that on February 27, 2017, Mr. Magolo, who was the appellant's advocate in the High Court, indicated that "I have just been served with the record of appeal. I need time to file written submission", whereupon he was directed to file and serve submissions within fourteen days. In subsequent mentions on March 21, 2017,April 25, 2017, May 9, 2017, August 28, 2017, November 9, 2017, and March 12, 2018the time to file submissions was extended, including on some occasions the counsel for the Appellant indicating that he would make oral submissions. The appellant was therefore not only represented by counsel who was served with the record of appeal, but the said counsel had ample time to prepare by the time of the hearing of the appeal held on August 31, 2018, and simply failed to do so. The trial Judge cannot be faulted in the circumstances on deciding the appeal on the basis of the record and applicable law.

10. The second ground of appeal put forward was the manner of taking of the victim's evidence was in contravention of section 19 of the *Oaths and Statutory Declarations Act* as the voire dire examination by the trial Magistrate did not appear to have been directed at finding out if the witness understood "the meaning, nature and purpose of oath", and that after ruling in the affirmative on this question, he proceeded to prevent the child from taking an oath. Therefore, that the evidence of that victim ought not to have been considered, and in any event did not establish that there was penetration and ought to have been corroborated. The counsel cited the decision in *Joseph Opondo Onago v Republic* (2000) e KLR on the manner of conducting a voire dire examination.

11. Mr. Mulamula's position on the issue was that the trial Magistrate asked the proper questions during the voire dire examination and the Appellant had the opportunity to cross-examine the victim. On the issue of reliance on the evidence of a minor, counsel cited the case of *JWA v R* (2014) eKLR and section 124 of the *Evidence Act* and urged that the victim was found truthful. Under section 19 of the *Oaths and Statutory Declaration Act*, if in the opinion of the court a child of tender years who is called as a witness understands the nature of an oath, they may give sworn testimony. If the child does not

understand the nature of an oath, his or her unsworn evidence may still be received if the court is of the opinion that the child possesses sufficient intelligence to give evidence and understands the importance of telling the truth. A voir dire examination is conducted by the trial court to ascertain and enable it form the opinion as to the child's understanding and intelligence in this regard.

12. The record of the trialcourt shows that on August 25, 2015, the trial magistrate conducted the following examination of the victim, who testified as PW3:

> " Voir Dire Examination
>
> Ql What is your name.
>
> A EO.
>
> Q2 Where do you come from.
>
> A I come from [Particulars withheld] in Ukunda.
>
> Q Do you know where you are now?
>
> A Yes, I am in court.
>
> Q Where do you go to school
>
> A I attend [Particulars withheld] Primary school.
>
> Q Which class?
>
> A I am in class three.
>
> Q Do you attend church?
>
> A Yes, I attend Bethol in Ukunda
>
> Q Do you know your pastor?
>
> A No
>
> Q Do you know your Sunday school.
>
> A Yes
>
> Q Who is your Sunday school teacher.
>
> A Madam Ruth.
>
> Q What happens to somebody who tells lies?
>
> A He is burnt by Satan.
>
> Q What happened in heaven
>
> A Punishment is given by God in heaven.
>
> Court: Although the minor appears to understand importance of oath, considering her age, I direct she gives unsworn evidence."

13. It is evident from the record that the trial court recorded the questions and answers verbatim, which is a correct format, as held by this court in *Maripett Loonkomok v R* (2016) e KLR: that there was an examination conducted of the complainant, and that the trial court thereafter formed an opinion that

the complainant could give unsworn evidence. The record to this extent demonstrates the basis of the trial court's opinion that the complainant was intelligent enough to give unsworn evidence. In any event, any irregularity in the conduct of a voir dire examination does not vitiate the entire prosecution's case, and the only effect is that the evidence of the child of tender years will in such circumstances require to be corroborated by other material evidence. In the present appeal, the evidence of PW3 as to identification of the perpetrator of the offence was corroborated by PW1 and PW2, as the appellant was their neighbor and well known to them; and the evidence of penetration was corroborated by the medical evidence of PW5 who examined PW3. Therefore, the evidence of PW3 was sufficiently corroborated, and the ingredients of the offence of defilement proved to the required standard. The High Court therefore did not err in its analysis of the evidence.

14. The last ground of appeal was made in the context of urging us not to consider a retrial, namely that the charge sheet was defective and not supported by the evidence. We feel constrained to express our surprise and astonishment as regards the reasons proffered by Mr. Magolo, which were that while the charge sheet stated that the appellant penetrated the vagina, the evidence pointed to penetration of both the vagina and anus of the victim. Mr. Mulamula was of a contrary view, and relied on the case of *Sigilani v R* (2004) 2 KLR 480 as well as section 134 of the *Criminal Procedure Code* to submit that the appellant was charged with an offence known in law and he had sufficient notice of the charges he was facing.

15. Under section 134 of the *Criminal Procedure Code*, a charge sheet should contain a statement of the specific offence and section of the law with which an accused is charged with, and enough information to demonstrate the nature of the offence charged. The appellant had been 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, which provide as follows:

    1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

16. Penetration is explicitly defined in the *Sexual Offences Act* as the partial or complete insertion of the genital organs of a person into the genital organs of another person, and the particulars in the charge sheet in the present appeal were not at all vague or wanting in this respect, as the particulars of the offence were framed as follows:

> " Fredrick Gilbert Banda: On the 21st day of March 2015 at about 11.00am at [Particulars withheld] area of Ukunda Township within Kwale County unlawfully and intentionally caused his penis to penetrate the vagina of EAO, a girl aged 9 years".

17. It is our view that the particulars of penetration of one genital organ is sufficient to sustain a charge of defilement, and already presents a grave and distressing offence. It is our view that evidence adduced of penetration of two or additional genital organs is not material in relation to the charge sheet, but as an aggravating factor, which unfortunately we cannot now take into account in light of the withdrawal of the appeal against the sentence by Mr. Magolo.

18. We accordingly find that this appeal has no merit and the same is dismissed in its entirety. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

.....

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