Ngaruiya v Republic (Criminal Appeal 68 of 2021)
[2023] KECA 878 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 878 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 68 OF 2021

MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA

JULY 7, 2023

BETWEEN

JOHN WANYEKI NGARUIYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Kimaru, J.) dated 10th March, 2016 in Nairobi HCCRA No. 18 of 2015)

JUDGMENT

1. John Wanyeki Ngaruiya, the appellant, has preferred this second appeal challenging his conviction and sentence for the offence of defilement contrary to section 8(1) as read with section 8(3) the *Sexual Offences Act*.

2. The particulars of the offence were that on July 16, 2012 in Githunguri District of Kiambu County, the appellant intentionally caused his penis to penetrate the vagina of FWM, a child aged 9 years. He also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* whose particulars we need not give as he was not convicted and sentenced on the same.

3. The appellant denied the charges, was tried, found guilty of the offence, and upon conviction was sentenced to serve life imprisonment. Aggrieved by the conviction and sentence, he preferred a first appeal against both conviction and sentence at the High Court in Nairobi. The same was heard by L Kimaru, J (as he then was) who, by a judgment delivered on March 10, 2016, dismissed it in its entirety.

4. Still dissatisfied with the said judgment of the High Court, the appellant has now preferred this second and perhaps last appeal on 6 grounds that: the learned Judge erred in law in failing to observe that the medical evidence did not prove that the appellant had committed the alleged offence; the whole prosecution case was marred by explicit inconsistencies and contradictions; the voire dire examination

was not properly conducted; failing to analyze and evaluate the evidence tendered in the trial court and come up with an independent conclusion; the prosecution did not prove its case beyond reasonable doubt as required; and lastly, failing to give due regard to the sworn statement of defence statement of the appellant.

5. Before we delve into the merits or otherwise of the appeal, it is necessary to set out the case that was before the two courts below albeit in summary.

6. At the trial court, the prosecution called a total of 4 witnesses. FWM (PW1) testified that she was aged 9 years old at the time of the incident. She stated that on the day of the incident, she had been sent by her mother, LWM (PW2) to collect milk from the appellant's home. When she got there, she found the appellant's wife with their newborn child in the house. The appellant's wife served her tea and left her with the child as she went to get the milk. She stepped out of the house after the appellant came in. There were other children playing outside the house. The appellant came out of the house and chased them away. He then held her hand, led her to his son's house within the compound, and defiled her. She tried to scream but the appellant blocked her mouth with his hand. They then heard a knock on the door and the appellant stopped what he was doing. He opened the door and found PW2 at the doorstep.

7. The evidence of PW2 was that PW1 was aged 9 years, and produced her birth certificate in evidence. She had sent PW1 to the appellant's house to collect milk. After PW1 took too long to come back, she went looking for her. She knocked on the door of the appellant's main house but there was no response. She walked to the appellant's son's house and knocked on the door whereupon the appellant came out of the house with PW1 in tow. She asked the appellant what he had been doing with PW1 inside the house, and he told her that they had entered the house through another door. Since she knew that the house had only one door, PW2 figured that the appellant was lying. She asked PW1 what had happened and PW1 told her that the appellant had sexually assaulted her. She saw the appellant pointing at PW1 trying to intimidate her not to speak up.

8. PW2 reported the incident at Githunguri Police Station. The police advised her to take PW1 to Githunguri Health Centre for a medical examination. At the health centre, PW1 was examined by PW3, Sabina Njeri, a Clinical Officer who noted light bruises on the vaginal wall and perforated hymen, and opined that she had been defiled. PW4, PC Alice Laban was assigned to investigate the case. After concluding her investigations, she formed the view that indeed a case had been established for the appellant to be charged with the offences.

9. Placed on his defence, the appellant and his wife DW2, LMN, gave sworn testimony. They testified that on the day in question, they were at home when PW1 came to collect milk. She did collect the milk and then left. Soon thereafter, they heard PW2 screaming outside their house. A crowd gathered and PW2 told them that the appellant had defiled PW1. That the appellant was arrested by members of the public, escorted to the police station, and charged with an offence he did not commit.

10. The appeal was canvassed by way of written submissions. On medical evidence, the appellant submitted that the prosecution did not conclusively prove that he had committed the alleged offence. That PW3 examined PW1 on the same day and noted that the genitalia had slight bruises with a perforated hymen. There was no bleeding or discharge noted. The approximate age of injury according to PW3 was hours. It was therefore clear that the minor had not been defiled by him since PW3 examined PW1 within an hour of the act. That PW1 could not therefore have had sex in the daytime with someone else. The DNA test ought to have been conducted to ascertain that the appellant had sexual contact with PW1 and therefore culpable. The appellant relied on the cases of *Manson*

vs Braithwaite 432 U.S 98 [19ZZ] Z and *Amos Kin Yua Kugi vs Republic [2015] eKLR*, for this proposition.

11. On explicit inconsistencies and contradictions in the prosecution's case, it was submitted that PW1 and PW2 testimonies proved that they were not honest as they contradicted each other in material particulars. Thus, the credibility of their evidence was put in question. Had the High Court re-evaluated and re-analyzed the evidence of the trial court as required it would not have failed to capture this. The appellant relied on the case of *John Mutua Munyoki vs Republic [2017] eKLR* to submit that these were not merely minor inconsistencies and contradictions but were material rendering evidence incredible.

12. On voire dire examination, the appellant relied on the case of *Joseph Opondo Onago vs Republic [2000] eKLR* to submit that voire dire was not properly conducted given the flippant questions put to PW1 by the court. This was an omission that raised the question of whether the evidence of PW1 was properly received.

13. Regarding failure to analyze and evaluate the evidence tendered in the trial court, the appellant relied on the case of *Okeno vs. Republic [1972] EA 32* to submit that the first appellate court's judgment does not reflect that this statutory duty was undertaken. He further stated that the learned Judge did not consider his grounds of appeal nor did he give reasons as to why he agreed or disagreed with each ground.

14. Turning on proof of the case, the appellant relied on the case of *Juma Ngodia vs Republic [1982-88] KAR 454* to submit that PW2 clearly testified that she screamed and that members of the public gathered. That if this was true, why were the members of the public not called to testify. How about the children who were playing in the compound. To the appellant, these were crucial witnesses who would have corroborated the evidence of PWI and PW2. In the defence of the appellant, it was submitted that it was plausible and had been backed by witnesses. However, both courts below did not at all consider it and determine whether it was believable and displaced the prosecution's evidence.

15. The respondent on the other hand submitted that the age of the victim was proved by the birth certificate. Regarding penetration, it was submitted that the same was properly proved by the evidence of PW3, a clinical officer, who produced the P3 form confirming that there was no hymen and that there was the presence of pus cells. It was therefore, concluded that PW1 had been sexually assaulted and that penetration was therefore proved. The respondent relied on the cases of *Jackson Mwanzia Musembi vs Republic [2017] eKLR* and *Mark Ouriri Mose vs Republic [2013] eKLR* to support the contention.

16. Turning on the identification of the appellant, the respondent submitted that the appellant was clearly identified by PW1 as she and her siblings used to regularly go to his house to collect milk. He was therefore familiar to her from the previous encounters and that it was not a matter of identification of a stranger but one of recognition. Her evidence was corroborated by the evidence of PW2, who found PW1 and the appellant emerging from the appellant's son's house.

17. This is a second appeal and this Court is therefore 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 based on no evidence or they are based on a misapprehension of the evidence, or that the said courts are shown demonstrably to have acted on wrong principles in making the findings. This role was succinctly set out in *Karani vs Republic [2010] 1 KLR 73* wherein this Court expressed:

> ' 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.'

18. Cognizant of the above jurisdiction and having read the record and in consideration of the rival arguments therein, we discern that the broad issue falling for our determination is whether the prosecution proved its case against the appellant to the standard required.

19. The appellant's complaint that the first appellate court did not subject the evidence to fresh scrutiny, analysis and re-evaluation is not an idle one. A first appeal always proceeds by way of re-hearing based on the evidence on record and an appellant is therefore entitled to expect that the first appellate court will go beyond a mere rehashing of what is on record or a repetition of the findings of the trial court.

20. There is no set format as to how this statutory role is undertaken. However, the 1st appellate court is required to and must be seen to have consciously and deliberately subjected the entire evidence to thorough scrutiny so as to arrive at its own independent conclusions on the factual issues in contention, and to determine on its own, the guilt or otherwise of an accused person. The only limitation to its task being a remembrance that it is without the advantage enjoyed by the trial court of seeing and observing the witnesses as they testified, for which it must give due allowance. See *Pandya vs Republic [1957] EA 336* and Okeno vs Republic [1972] EA 32.

21. A perusal of the record and the judgment of the High Court clearly shows that the first appellate court conducted its duty as required by the law. The court before delving into the issues for determination stated thus:

> ' This being a first appeal, it is the duty of this court to re- evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (See Njoroge vs. Republic [1987] KLR 19). The issue for determination by this court is whether the prosecution proved its case against the appellant to the required standard of proof beyond any reasonable doubt.'

No doubt the High Court undertook its statutory duty scrupulously and therefore the complaint by the appellant on this score is unmerited.

22. The appellant has submitted much on the issue as to whether there was proof of defilement. The ingredient greatly submitted on was proof of penetration which the appellant claims that it was not proved. That PW3 testified that the time of the injuries was within 6 hours, yet PW1 was taken for examination within an hour after the purported incident. That the act might therefore have been perpetrated elsewhere by a different person and that the appellant was therefore a victim of circumstances. In the premises, if there was any penetration, it must have been committed by someone else and not the appellant. The High Court in dealing with the issue stated:

> ' In respect of the first ingredient of penetration, the prosecution relied on the evidence of the complainant that the Appellant inserted his penis into her vagina. Section 2(1) of the *Sexual Offences Act* defines penetration as 'the partial or complete insertion of the genital organ of a person into the genital organs of another person'.

> In the present case, the complainant's testimony was corroborated by the medical evidence of PW3, a clinical officer. The finding of PW3 was that the complainant had bruises in her vaginal wall. She also noted that the complainant had a perforated hymen. The evidence of the complainant was therefore substantiated by the medical evidence since she had sustained injuries in her genital organs. In light of the medical evidence of PW3, although the complainant's hymen was not torn, this court finds that there was at least partial penetration of the complainant.'

23. This was also the finding of the trial court. Accordingly, these were concurrent findings of the two courts below and we have no reason to depart from them. Indeed, the appellant was even placed at the scene of crime as the perpetrator of the offence. The appellant does not dispute the fact that at the material time, PW1 was in his compound. There is no possibility therefore that PW1 could have been defiled elsewhere by another person. As it were, the appellant was nearly caught red-handed. It does not matter that PW3 testified that defilement could have occurred within 6 hours, though PW1 had been examined within an hour of the act. PW3's evidence was a mere estimate of the time. She was not bound to be exact and in any case, the 1 hour still falls within the 6-hour bracket.

24. We have also looked at the record and noted that on August 12, 2013, a voire dire examination was administered on PW1 and we are satisfied that the requirement of the law was met contrary to the appellant's submission. Even if it was not properly conducted, that will not be a ground to vitiate the entire prosecution case. See *Maripett Loonkomok vs Republic [2016] eKLR*.

25. With regard to the appellant's defence, the High Court stated that:

> ' Upon re-evaluation of the evidence adduced, it was clear to this Court that the complainant had no reason to point at the appellant as the person who sexually assaulted her if indeed, he did not do it. There was no proof of PW2's involvement in the appellant's alleged family feud as claimed by DW2. This court formed the view that the defence put forward by the appellant did not displace the prosecution's case. Accordingly, this court finds that the prosecution identified the perpetrator of the offence to the required standard of proof satisfying the final ingredient of the offence.'

26. It is clear from the judgment that the first court did evaluate the defence and arrived at a conclusion and rightly so in our view that the same did not displace the evidence by the prosecution.

27. On the whole, we find no merit in the appeal which is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR