Noor v Republic (Criminal Appeal 22 of 2020) [2023] KECA 875 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 875 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 22 OF 2020

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

JULY 7, 2023

BETWEEN

MOHAMED SARAH NOOR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the entire judgment of the High Court at Wajir (C. Kariuki, J.) delivered on 26th September 2019 in Criminal Appeal No. 14 of 2019)

JUDGMENT

1. The appellant, Mohamed Sarah Noor was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on the February 18, 2018 in Habaswein sub-county within Wajir County, the appellant intentionally caused his penis to penetrate the vagina of the complainant, FHM (PW2) a child aged 15 years. The appellant denied committing the offence and called two witnesses. To prove its case, the prosecution called 5 witnesses.

2. The trial court after full trial convicted the appellant for the offence of defilement of a child and sentenced him to serve 20 years' imprisonment. Dissatisfied with that decision, he lodged an appeal to the High Court challenging the conviction and sentence. The High Court upheld the conviction, but reduced the sentence to imprisonment of 15 years. Aggrieved by that decision, the appellant is now before this Court on second appeal.

3. Before setting out the appellant's grievances, it is necessary to outline the evidence that was before the trial court. PW1 DB, the complainant's mother testified that on February 14, 2018, FHM, the complainant, who was a student was given permission to go home from school as she was unwell. On leaving the school on February 18, 2018, FHM disappeared without a trace. DB searched for her for two days, and then reported her disappearance to the police. On the third day, FHM resurfaced looking dazed and mentally ill. She had blood stains on her clothes. DB was angered and slapped her, whilst also

probing to find out where she had been. The complainant told her that the only thing she remembered was boarding a taxi to come home. DB took her to hospital where FHM was examined, whereafter the medical doctor informed her that FHM had been defiled. She was subsequently issued with a P3 form.

4. DB further testified that she was informed that FHM had boarded a taxi owned by one Mohamed Sarah, the appellant's father, and that she saw the motor vehicle being driven by his father in the period immediately after the disappearance of the complainant. She confirmed that FHM was 15 years of age and produced her birth certificate.

5. FHM, the complainant stated that on February 14, 2018 she was given permission to go home and on February 18, 2018, she purposed to visit her aunt in Wajir, without the knowledge of her parents after attending the hospital. Since she did not have money, she sought a lift from a taxi driven by the appellant, that had the word 'Wamba' printed on the windscreen; that while seated in the vehicle she felt thirsty and requested for some water to drink. The appellant gave her water which she drank, and on reaching a house, she lost consciousness. When she regained consciousness, she recalled seeing the appellant having sex with her. He was seated on top of her. She again lost consciousness, and when she awoke the following morning, she felt pain around her waist, and her lower body. She saw that her panty and pantyhose had been removed.

6. She testified that the following morning, the appellant locked the room and left. Later in the afternoon she was picked by two other men who moved her to another house where they also sexually assaulted her the whole night. The next day, they locked her in the house and returned to pick her at 4.00 pm They left her near Alhamdu, whereupon she managed to find her way home. On arrival, she was beaten by her parents, but she nevertheless informed them of what had transpired. She was taken to hospital where she was treated and issued with a P3 form. She stated that she recognized the appellant and would not mistake him for someone else.

7. PW3 Dr. Aweis Ismae examined FHM on 2February 1, 2018, where he observed bruises on the inner thighs of both the lower limbs and on examination of the genitalia, there were lacerations on the vaginal wall and on the part of the cervix. The hymen was broken, but he could not tell whether it was freshly broken. There was also a bloody discharge, but he ruled out menstruation. On conducting urinalysis, he found that PW2 had a urinary tract infection. He also examined the appellant and found that he too had a urinary tract infection or a communicable disease.

8. PW4 AA, the Principal of the complainant's school confirmed that FHM had been given permission to go home due to illness. She was released on February 14, 2018 and was to report back on February 18, 2018 as exams were due to commence on February 19, 2018. He heard of FHM's defilement in the media and recorded a statement.

9. PW5, PC Henry Maina, the Investigating Officer received the complainant accompanied by her parents at the police station. They had come to report a gang rape on February 21, 2018 by the appellant. Together with PW6 Sgt. Moses Mwangi, they arrested the appellant.

10. At the close of the prosecution's case, the trial court placed the appellant on his defence. The appellant gave sworn evidence in which his alibi defence was that between February 18, 2018 and February 21, 2018, he reported to his mother's shop at 6.00 am and left at 8.00 pm; that his father owned the taxi, the subject motor vehicle, but during the period in question, it was his father who was driving it and that he (the appellant) only drove it on February 22, 2018, the day he was arrested. DW2 SA and DW3 DS, the appellant's parents gave similar testimonies to that of the appellant. The appellant was nonetheless convicted and sentenced as already stated.

11. Being dissatisfied with the decisions of the trial court and the High Court, the appellant has brought this appeal on numerous grounds which we shall summarise as; the learned judge was in error in failing to test the prosecution evidence of defilement against the standard of proof beyond reasonable doubt; that the judge erroneously held that penetration was not in dispute, despite lack of cogent evidence that linked the appellant to defilement of the complainant; that the complainant failed 'to describe the manner in which' the appellant penetrated her; that the nexus between the penetration of the complainant by the appellant was not proved; that the evidence of the doctor, PW3 did not confirm whether the hymen was freshly broken; that the judge miscomprehended the facts when he failed to resolve and reconcile the apparent doubts, manifest contradictions and patent inconsistencies in prosecution witness testimonies, and also failed to re-evaluate the evidence thereby arriving at erroneous decision; in dismissing the appellant's defence and shifting the evidential and legal burden of proof to the appellant, which evidence was not rebutted or disputed; in concluding that the appellant had an obligation to call more witnesses, other than DW2 and DW3 to affirm the appellant's defence of alibi; that the burden to disprove an alibi always lies with the prosecution; in failing to warn himself against the dangers of relying on the evidence of a single witness; in failing to find that the appellant was not properly identified given that the complainant lost consciousness, and was defiled by two other men who were never arraigned before court; in finding that the identification parade was unnecessary, because the complainant's recognition of the appellant stood unchallenged; in failing to find that the production of the medical report under section 77 (1) of the *Evidence Act* was not safe and therefore contravened Article 50 (4) of the *Constitution*; in failing to consider that the complainant's evidence was not voluntarily given, and therefore it was illegally and irregularly obtained which was contrary to Article 50 (4) of the *Constitution*; that the complainant was coached by the prosecution and was contrary to Article 50 (4) of the *Constitution*, and finally in imposing a harsh and excessive sentence of 15 years.

12. When the appeal came up for hearing on a virtual platform,Mr. Jamal Bake, learned counsel appeared for the appellant while Mr. Okatch learned prosecution counsel appeared for the State. Mr Okach informed us that he had filed a notice to enhance the sentence. Pursuant to the notice, the appellant was warned of the consequences and effect of proceeding with the appeal should it fail. Notwithstanding advise from his counsel, the appellant chose to proceed with the appeal nonetheless.

13. Both parties filed written submissions which were adopted in their entirety, though counsel sought to highlight the submissions. The appellant's counsel begun by submitting that, there were serious inconsistencies and contradictions in the prosecution's case; that the complainant's testimony was not voluntary because she was beaten by her parents to admit that she was defiled, and also admitted to having been coached; that therefore her evidence was obtained illegally, and was inadmissible. It was further submitted that the prosecution did not discharge the burden of proof to show that the appellant committed the offence; that it was committed by three men, but only the appellant was charged; that the other two assailants had fled to Kismayu.

14. Regarding his alibi defence, it was submitted that both courts below wrongly found that the evidence of DW 2 and DW 3 could not be relied upon because they are the appellant's parents. On identification, it was asserted that though the two courts below found that the identification parade was unnecessary, since the other two men were not part of the proceedings, it was argued that the identification parade was necessary since the complainant was not in her right frame of mind, to identify the appellant, and that the appellant was not known to her. Counsel further submitted that the medical report did not show that there was penetration since her hymen was not freshly broken and the presence of blood was menstrual discharge; that nothing connected the appellant with the offence; that further,

notwithstanding that both the appellant and the complainant had a urinary tract infection, it was not contagious.

15. For his part, Mr. Okatch submitted that, the prosecution's case was watertight. The appellant was placed at the scene and both the appellant and the complainant were known to each other by the time he defiled her in the house where he had taken her. Regarding the contradictions and inconsistencies, counsel submitted that they were insignificant when considered against the weight of the prosecution evidence.

16. Concerning the allegation that the complainant was forced to testify against the appellant and had been coached, counsel stated that this was not demonstrated and that the complainant had testified voluntarily. Turning to the alibi defence, counsel asserted that the appellant admitted to having used the same motor vehicle to abduct the complainant.

17. On identification of the appellant, it was stated that an identification parade was unnecessary since the complainant was able to recognise and identify the appellant; that furthermore, after the appellant and the complainant were examined, the doctor found that they both had the same unitary tract infection which could not be considered a coincidence.

18. Turning to the sentence, counsel submitted that the lower court considered the appellant's demeanour, and found that he was not remorseful, despite having sexually assaulted the complainant; that the trial court imposed a sentence of 20 years as prescribed by law for a child aged 15 years. That the High Court had unlawfully reduced the sentence to 15 years. Counsel urged that this Court reinstate the sentence of 20 years imposed by the trial court.

19. We have considered the grounds of appeal and the parties' submissions. This Court has variously stated that this being a second appeal, its mandate is restricted to matters of law, as was set out in the case of *John Kariuki Gikonyo v Republic* [2019] eKLR thus:

> "(15) This being a second appeal as we have already stated, our jurisdiction is limited to matters of law only. In David Njoroge v Republic, [2011] eKLR, this court stated that under section 361 of the Criminal Procedure Code:
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> > "Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong v Republic (1984) KLR 213"."

20. Since our mandate pertains to matters of law, the issues that present themselves for consideration are;

    i. whether the offence for which the appellant was convicted and sentenced for was proved to the required standard;

    ii. whether the appellant's alibi defence was disregarded;

    iii. whether the High Court re-evaluated the evidence; and

    iv. whether the prosecution's evidence was riddled with contradictions and inconsistencies.

21. Beginning with whether the offence was proved to the required standard, to ascertain whether the conviction was safe, we are required to interrogate whether the prosecution established the complainant's age, whether the appellant was properly identified, and whether penetration was proved.

22. Regarding FHM's age, the proceedings do not disclose that this was contested by the appellant, and both the courts below found as a matter of fact that FHM was aged 15 years old at the time of the incident. PW1 produced the complaint's Birth Certificate, which confirmed that her daughter was aged 15 years. Her age was also confirmed by the medical doctor. In view of the concurrent findings of fact by the two courts that FHM was 15 years of age, we have no reason to interfere with that finding.

23. On the issue of penetration, the appellant has sought to argue that penetration was not proved because there was no evidence that demonstrated that the appellant penetrated the complainant; that since there was no contact between the genitalia organs of the appellant and the complainant, no nexus was established between them; that furthermore, the evidence of the medical doctor PW3 did not confirm that her hymen was freshly broken.

24. In this regard, the trial court found that there was penetration, while the High Court observed that, the appellant had not denied that there was penetration. Our reanalysis of the evidence discloses that, FHM was categorical that she was sexually assaulted by the appellant. After she boarded the appellant's taxi, and lost consciousness after drinking so called water, she found herself lying on a bed, her panty and pantyhose having been removed and the appellant was on top of her. Thereafter, she experienced pain in her lower abdomen and was bleeding from her vagina. The medical report found that there were bruises on the inner thigh of both her lower limbs, lacerations on the vaginal wall and her hymen was freshly ruptured. This evidence would point to nothing else than there having been penetration. Additionally, the trial court was satisfied that FHM was a truthful witness and that her evidence was firm and convincing. The court cannot therefore be faulted for relying on her evidence in terms of the proviso to section 124 of the *Evidence Act*. In view of the conclusion that we too have reached, we uphold the findings of both the trial court and the High Court that penetration was proved.

25. As to whether it was the appellant who defiled FHM, the appellant has contended that he was not properly identified. It is his case that he was not present when FHM was abducted; that FHM was in no position to identify him if she was unconscious and when no identification parade was mounted to identify him; that in any event, FHM had alluded to the existence of two other men who also defiled her. He further complained that the trial court was wrong to convict him on the evidence of a single identifying witness. As such, there was doubt as to whether he was properly identified. Furthermore, his alibi defence was that on the material day, he was in his mother's shop, and therefore he could not have been at the scene where the offence took place.

26. In addressing this issue, the trial court had this to say;

> "70. The evidence shows that the accused person approached her at around 4 pm, which means that there was sufficient light for the complainant to see the person she was engaging with. She also got into the accused persons vehicle, and even noticed that the back of the said vehicle had the name, "Wamba" written on it. That entry into the vehicle offered her more opportunity to familiarise herself with the features of the accused person, and she cannot therefore be mistaken as to who took her on the material day.
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> 71. Finally, there is the evidence that she awoke to find herself in the same room as the accused person which offered additional opportunity to the complainant to see and memorise the features of the accused...

> 74. And the evidence given by the complainant regarding the in (sic) identity of the attacker, and the description of the vehicle was so specific as to exclude any possibility of any randomness or vendetta, and I am convinced of her credibility as a witness."

27. The above excerpt is clear that in concluding that the appellant was properly identified, the trial court considered the conditions for identification, and found them to have been favourable.

28. In the case of *Cleaphas Otieno Wamunga v Republic* (1989) eKLR this Court stated thus;

> "it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

29. With sufficient daylight the moment FHM boarded the taxi at 4.00 pm until she lost consciousness, the conditions were favourable enough to enable her identify the appellant. When she later regained consciousness, she again saw the appellant, this time within close proximity, as he was on top of her. Thereafter, she spent a considerable period of time with him in the house before he left her, which provided her with sufficient opportunity to see and identify him. She was clear that there was no possibility of mistaking him for someone else. Also lending support to her ability to recognise him, was his connection to the motor vehicle *"Wamba"* which she boarded on the material day. On the basis of this evidence FHM was able to properly identify the appellant which rendered the necessity of a conduct of an identification parade superfluous.

30. Related to this is the appellant's complaint that the courts below disregarded his alibi defence that he was in his mother's shop and then went to sleep at his parents' home for two days thereafter, and so, could not have been at the scene. In determining this issue, both the courts below found the alibi defence to be an afterthought coming so late in the day, that no opportunity could be afforded to the prosecution to ascertain his whereabouts for the entire period that FHM was subjected to the harrowing ordeal.

31. We would agree with the lower court's observations, and would further add that, when the alibi is considered alongside the available evidence that squarely placed him as the driver of the *"Wamba"* taxi that abducted FHM, there can be no question that the prosecution's evidence far outweighed his alibi defence, thereby rendering it implausible and unbelievable. We find that the courts below were right in dismissing it, so that this ground of appeal accordingly fails.

32. In the circumstances, as were the two courts below, we too are satisfied that the appellant was properly identified as the person who abducted FHM and defiled her at the location where the offence took place.

33. As concerns the complaint that the courts below failed to properly evaluate the evidence and also failed to take into account the contradictions and inconsistencies in the evidence, given the conclusions reached above, there is no doubt that both the courts below properly evaluated the evidence, and in so doing reached the right conclusion that the prosecution proved its case to the required standard that the appellant was responsible for defiling FHM. And notwithstanding the inconsistences and contradictions in the evidence complained of, as were the two courts below, we are not persuaded that they in any way dispelled or dislodge the prosecution's case. We find them to be immaterial and inconsequential and we accordingly dismiss both grounds.

34. In view of the foregoing findings, we are satisfied that the offence was proved to the required standard, hence rendering the conviction as safe, with the result that, the appellant's appeal against conviction is accordingly dismissed in its entirety.

35. On the final issue, the trial court sentenced the appellant to 20 years' imprisonment as by law prescribed undersection 8 (1) as read with section 8(3) of the*Sexual Offences Act*.

36. Invoking the Supreme Court case of *Francis Karioko Muruatetu v Republic* [2017] eKLR the High Court reduced the sentence to 15 years. The prosecution has sought the enhancement of this sentence for the reason that the law having prescribed a minimum sentence of 20 years, the sentence imposed by the High Court was illegal, and therefore this court should revert the sentence to 20 years. Since then, on July 16, 2021, the Supreme Court has declared that *Francis Karioko Muruatetu* (supra) only applied to "...sentences of murder under Sections 203 and 204 of the *Penal Code*". Therefore, this being a sentence concerning defilement of a child under the *Sexual Offences Act*, the High Court, had no discretion to interfere with the sentence by invoking the decision in the Francis Muruatetu case (supra).

37. In the instant case, the appellant having been warned of the possibility of enhancement of the sentence in the event his appeal was unsuccessful, we find the sentence imposed by the High Court to have been unlawful, and hereby reinstate the sentence imposed by the trial court of 20 years.

38. In sum, the appeal against conviction is unmerited and is dismissed, whilst, the sentence of 20 years imposed by the trial court is hereby reinstated.

39. It is so ordered.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR