Ngiru v Republic (Criminal Appeal 26 of 2018) [2023] KECA 1588 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1588 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 26 OF 2018

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

OCTOBER 27, 2023

BETWEEN

JAMES NGIRU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the conviction and sentence of the High Court of Kenya at Meru (S. Chitembwe J.) dated 25th January 2018 in Criminal Appeal No. 42 of 2016)

JUDGMENT

1. The appellant, James Ngiru, was convicted by the Senior Resident Magistrate at Isiolo of defilement contrary to Section 8(1) of the *Sexual Offences Act* and sentenced to life imprisonment. The particulars of the offence were that on 19th June 2015 at about 9:00 pm at Archers Post Trading Center in Samburu County he intentionally caused his penis to penetrate the vagina of SE a child aged 6 years. He was sentenced to serve life in prison. Being aggrieved by the conviction and sentence, he appealed to the High Court at Meru (S. Chitembwe, J.) who, upon hearing, dismissed the appeal in its entirety.

2. The appellant has now come before us on second appeal. His complaint is contained in the Memorandum of Appeal whose grounds are as follows:-

   “ 1) That the appellate judge erred in matters of law by failing to NOTE that the appellant was not given by the trial court an opportunity to cross-examine the complainant which is not a fair trial according to Article 50 of *the Constitution* of Kenya, 2010.

   2. That the learned appellate Judge erred in matters of law under section 208(3) of the Criminal Procedure Code (CPC).

3. That the learned Judge erred in matters of law by failing to notethat the age of the complainant was not proved.

4. That the learned appellate Judge erred in matters of law by failing to notethat the complainant was defiled in another case as indicated in the court proceedings vide case No. 505/2014 (see page 3 line 24) of the proceedings).

5. That the learned appellate Judge erred in matters of law when he failed to note that No tangible evidence was presented to the court to link the appellant to the present charges.

6. That the learned appellate judge erred in both law by failing to note that the light used to identify the appellant at the scene was not analyzed.

7. That the learned appellate judge rejected the appellant defence without giving cogent reasons."

3. Our jurisdiction on second appeal is limited to the consideration of questions of law. We are under the legal duty to accept the concurrent findings of facts by the two courts below, and can only interfere if it can be demonstrated that there was no evidence upon which such findings were based, or if the evidence was of such nature that no reasonable court could be expected to base its decision in it (see *Boniface Kamande & 2 others v Republic, Criminal Appeal No. 166 of 2004*).

4. The evidence on which the appellant was convicted was that the complainant (PW 1) was a nursery school child. Her mother had a mental problem, but had been living with the appellant as his wife for several months. PW1 did not know her age. She testified while not on oath following voire dire examination. She stated that she was sleeping in their home the material night when the appellant came, removed her clothes, lay on her and put his penis into her anus. When he was through, he burnt her buttocks with a burning wood. During the ordeal she screamed but no one came to her rescue. She did not tell her mother what had happened until the following day. A neighbor AA (PW2) found PW1 with the mother this following day. PW1 was not walking normally. She (PW2) reported the incident to Archers Police Post. She returned to the home with police officers. PW1's mother was by the time quite violent. She was eventually subdued and PW1 taken to Archers Police Post before being taken for examination at Archers Post Dispensary. She was eventually taken to Isiolo County Hospital where senior clinical officer Karaiyu Jillo (PW5) found her unable to walk, had burns on both buttocks, her vulva was bruised and hymen broken.

5. The High Court confirmed the conviction on the evidence tendered, but what has attracted our attention is ground 1 of the appellant's grounds of appeal in which he complained as follows:-

> "1) That the learned appellate judge erred in matters of law by failing to note that the appellant was not given by the trial court an opportunity to cross-examine the complainant which is not a fair trial according to Article 50 of *the Constitution* of Kenya 2010."

6. In elaborating on the complaint, the appellant filed written submissions in which he contended that:

> "In the light of the omission by the trial court in its failure to invite the appellant to cross-examine the complainant it is for this Court to consider whether this is a suitable case for the Court to order for a retrial so that the appellant can be accorded a full and fair trial or otherwise."

On the importance of accused's right to examine a prosecution witness, the appellant made reference to Article 50(2) (k) of *the Constitution* and this Court's decision in Paul Kinyanjui Kimauku v Republic [2016[eKLR. Ms. Nandwa for the State filed written submissions in opposition to the appeal. She indicated to us during the hearing of the appeal that she was wholly relying on her submissions. However, the submissions did not make any reference to the failure by the trial court to have the appellant cross-examine PW1, and the consequences of such failure.

7. We have perused the record to see what happened before the trial court. PW1 was not cross-examined. This is what the trial court indicated after she had given her evidence in chief:-

> "Upon hearing the minor, I find that it would not be prudent to subject her evidence to cross- examination as she has tendered unsworn evidence and is still traumatized by the incident. As she was testifying the minor started crying. The court were itself of the unsworn evidence of a child of tender years."

8. During the first appeal, the learned Judge in his judgment picked up the issue of failure by the trial court to allow the appellant to cross- examine PW1 and proceeded as follows:-

> " The trial court shielded PW1 from cross- examination. The court was of the view that since PW1 had given unsworn testimony she could not be cross examined. The trial court also observed that PW 1 was crying as she was testifying. The procedure taken by the court was the wrong one. Once a witness testifies whether under oath or not, such a witness must be open to cross-examination. The trial court can control the...................(not legible) .... threats and intimidation is avoided. There is a difference between a witness who gives unsworn evidence and an accused who decides to give unsworn defence. The position of the accused giving unsworn defence is provided for under Section 211 of the Criminal Procedure Code. Article 50(1) allows an accused person to remain silent.
>
> These rights of an accused are not applicable to a witness. Section 208(2) of the Criminal Procedure Code allows the accused or his advocate to cross-examine a witness. Section 208(3) calls upon trial courts to allow unrepresented accused person to cross-examine the witness.
>
> The issue which arises is whether failure to have a witness to be cross-examined renders the prosecution case to be null and void or to be declared a mistrial. I do not think so. The court has to examine the totality of the evidence specifically the evidence of the other witnesses and arrive at a just conclusion taken into account the fact that a certain witness was not cross- examined. At times the minor witness is not the........(not legible) ....fact that the complainant was not cross-examined."

9. The learned Judge was right when he noted that an accused person is entitled to cross-examine a prosecution witness, whether the witness has been sworn or not. The cross- examination of a witness called by the prosecution to establish the guilt of an accused person is a fair trial right entrenched under Article 50(2) (k) of *the Constitution*. It matters not that the witness is a child or an adult. It matters not that the witness is testifying while sworn or while unsworn. This Court has emphasized this point in various decisions. For instance, in Paul Kinyanjui Kimauku v Republic [2016] eKLR that the appellant cited to us this is what was observed:-

> " 23. Again, the record reveals that following the evidence of G that was unsworn, the appellant was not given an opportunity to cross-examine the witness. This was a clear

violation of the appellant's right to a fair trial. Under Article 52 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 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."

10. It follows that when the learned Judge held that the shielding of PW1 from being cross examined by the appellant did not render the prosecution case null or void or make it liable to be declared a mistrial, he made a fundamental error. The failure by the trial court to allow PW1, whether or not she had been sworn, to be cross-examined by the appellant violated the latter's right to a fair trial under Article 50(2)(k) of *the Constitution*. This was a fundamental misstep in the appellant's trial, with the consequence that we declare the trial to be a mistrial.

11. We are left to deal with what to do with the mistrial. We consider that the appellant has been in jail for the offence since 2016. That is about seven (7) years. He is serving a life sentence as the child in question was aged six (6) years. It was not in dispute that at the time of the offence, the appellant was staying with the mother of the child. The child's mother was mentally challenged. This was his child, as it were. We are aware that, now that there was a mistrial, whether or not to acquit the appellant or order his retrial wholly depends on the circumstances of the case (see Muiruri v Republic [2003[KLR 552).

12. Given the circumstances of this case, we opt to order the retrial of the appellant. Consequently, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall remain in custody and shall be taken before the Chief Magistrate at Isiolo Law Courts to plead afresh to the charges within 14 days from the date of this judgment. It is emphasized that the trial magistrate shall not be the Senior Resident Magistrate, J.M. Irura. The trial court shall consider the issue of bond upon the taking of plea, and the trial shall be undertaken on a priority basis.

DATED AND DELIVERED AT NYERI THIS 27TH DAY OF OCTOBER 2023

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

....

JUDGE OF APPEAL

A.O. MUCHELULE

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR