



REPUBLIC OF KENYA



KENYA LAW
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CM v Republic (Criminal Appeal 6 of 2018)
[2023] KECA 1467 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1467 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 6 OF 2018
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
NOVEMBER 24, 2023

BETWEEN

CM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence of the High Court of Kenya at Meru (F. Gikonyo, J.) dated on 13th December 2017 in Criminal Appeal No. 61 of 2017)

JUDGMENT

1. This is a second appeal. This court's jurisdiction is confined to determining any questions of law that the appeal may raise. In *M'Riungu v Republic* [1983] KLR 455, this Court expressed itself in the following terms:-

“Where a right of appeal is confined to a question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decisions of the trial court or first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.”

2. The appellant, CM was the grandfather of the complainant N.M., in the sense that he was the father of the complainant's father. He was on 6th June 2017 convicted of defilement under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 26th June 2015 in Imenti South District within Meru County he had intentionally and unlawfully caused his penis to penetrate the vagina of N.M. a child aged 6 years. The conviction followed a trial conducted by the learned Resident Magistrate at Nkubu. In the trial, the prosecution called N.M. (PW2), her mother



PG (PW3), Children Officer Stephen Ndungu (PW4), PC Boniface Mutiso (PW5) of Tharane Police Post and Clinical Officer Saberina Kaimatheri (PW1) of Kanyekine District Hospital. The appellant gave a sworn statement in defence and called his brother and neighbor EK (DW2) as his witness.

3. The trial court considered the prosecution and defence evidence and determined that the guilt of the appellant had been proved beyond all reasonable doubt. Upon conviction the appellant was sentenced to life imprisonment.
4. The appellant was aggrieved by the conviction and sentence, and appealed to the High Court at Meru. The appeal was heard by the learned F. Gikonyo, J. who found no merit in it and confirmed both the conviction and sentence.
5. The appellant has now come before us on second appeal. His grounds of appeal as received on 3rd January 2018 were as follows:-

- “1) That the learned appellate Judge of the High Court erred in matters of law by failing to make findings that there were irregularities, inconsistency contradiction and fabrication of the allegations alleged that I committed.
- 2) That the learned appellate Judge of the High Court erred in law when he failed to note that the appellant was framed this case, enable the mother of complainant to occupy the property of the appellant.
- 30 That the learned appellate Judge of the High Court erred in matters of law by upholding conviction as the evidence adduced by the prosecution was inadequate and contradictory.
- 4) That the learned appellate Judge erred in matters of law by rejecting the appellant defence without giving cogent reason.
- 5) That the learned Judge of the High Court erred in matters of law when he failed to re-evaluate the evidences adduced as required by law.
- 6) That the appellant’s fundamental right to a fair and impartial trial as enshrined under article 25(c) of the *Constitution* was violated.
- 7) That these grounds have been laid down in the absence of the High Court’s Judgment and the same should be subjected to change if and when availed with the trial court proceedings and judgment.
- 8) That I pray to be present during the hearing of this appeal.”

He prayed that the appeal be allowed, the conviction quashed, the sentence set aside and he be set at liberty. He filed written submissions which essentially centered on the sentence which he complained was harsh and unconstitutional. Learned counsel for the State Ms. Nandwa filed written submissions and, like the appellant, was present during the hearing of this appeal. Learned counsel’s submission was that the appellant had been convicted on adequate evidence which the High Court had properly reconsidered and confirmed; that the appellant’s defence had been properly considered before being rejected; and that the sentence meted out was both legal and appropriate given the facts of the case. She asked that the appeal be dismissed in its entirety.

6. We have considered the entire record of appeal, the judgment subject of the appeal, the Memorandum of Appeal and the respective submissions. As we seek to determine whether there is merit in the appellant’s complaint that he had been convicted on evidence that had irregularities, inconsistencies, was contradictory and was a fabrication, we are alive to what the prosecution evidence was. After voire



dire examination, N.M.'s evidence was that her mother's house and that of the appellant were in the same homestead. The appellant was in the habit of sending her to the shop. On this day, he sent her to buy biscuits and cigarettes. When she returned to his house she went to sleep in her grandmother's bed. The appellant followed her to ask if the bed had been made well. He then took off his clothes, removed his male organ and penetrated her vagina. At that point her mother (PW3) came and found the appellant on top of PW2. When she examined her genitalia it was injured. One thing led to another, and PW3 reported to the local administration and then to the police. Next day PW2 was examined by PW1 who found that there was redness on her genitalia and that her hymen had been broken. It was the evidence of PW3 that during the course of that evening she wanted to send PW2 to the shop and went to the appellant's house to look for her. When she reached the house, she heard the appellant asking PW2 whether she was feeling sweet. On entering the house, the appellant was on top of the girl.

7. The appellant's defence was that the case was fabricated. He did not give any reason why PW2 and her mother (PW3) would frame him. His witness (DW2) stated as follows:-

“I have come to tell court that this issue is that the complainant was at the home of Chirilo playing with a radio. I was at my mother's place. Accused is my brother. So I was at our mother's place taking tea. The complainant's mother had come from the shamba. She then called the complainant to come from Chirilo's home she said she wanted to send her. The complainant did not hear the mother call because she was dancing inside the sitting room of Chirilo. The complainant's mother felt bad because she called her daughter and the daughter did not respond. This issue turned into another thing I even asked the complainant and she said it was a lie. That is all.”

8. It was common ground that PW2 was found in the appellant's house. PW2 stated that while on her grandmother's bed the appellant came there and slept with her. PW3 stated she found the appellant on top of PW2. She examined PW2 and found her injured. The medical examination found her genitalia was red and her hymen was broken. The trial court considered the version of the prosecution evidence and that of the defence, and concluded that PW2 had told the truth that the appellant had sexually penetrated her. This is what the learned Judge observed on appeal:

“Despite her tender age, the child victim gave a detailed and vivid explanation of the incident and nothing shows that she was not telling the truth or was mistaken. The trial magistrate conducted a *voire dire* examination of her and found her to be of sufficient intelligence to give sworn statement. I believe she was telling the truth.

23. The foregoing notwithstanding, her testimony was corroborated by the evidence of her mother and the clinical; officer's (PW3))”

9. The trial court had said the following about the complainant:-

“I believe the evidence of the complainant who despite her age had tried her level best to give a graphic explanation of her ordeal ”

10. We consider that, before accepting the evidence of the complainant on oath, the trial court had conducted a *voire dire* examination and found that she knew the importance of telling the truth and was intelligent enough to give sworn evidence. Under the proviso to section 124 of the *Evidence Act*, the trial court was entitled to convict the appellant on the evidence of the complainant alone if, for reasons to be recorded, the court was satisfied that she was telling the truth (see *Mohamed v Republic* [2006]KLR 138 and *Geoffrey Kioji v Republic*, Crim Appeal No. 270 of 2010 at Nyeri). In the instant case, both the trial court and the first appellate court found that the complainant was truthful and



accepted her evidence, but also found that, in any case, her evidence had been materially supported by that of her mother and the medical evidence. We accept these findings. It is clear to us that the first appellate court properly discharged its duty to reconsider and re-evaluate both the prosecution and the defence evidence tendered in the trial court before it came to its own independent conclusion that the appellant's guilt has been proved beyond all reasonable doubt.

11. On the question of the complainant's age, if that was the reason that the appellant based his complaint that he had been convicted on contradictory and incompetent evidence, we note that, although the charge sheet stated that PW2 was six (6) years old, her sworn evidence and that of her mother was that she was eight (8) years old. Her mother produced her immunization card that indicated that she had been born on 23rd June 2008. It meant she was eight (8) years old at the time she was testifying. Nothing therefore turns on that. In any case, where the prosecution has called several witnesses to prove its case, there are bound to be minor but insignificant contradictions and inconsistencies in their evidence. Not every contradiction or inconsistency by one witness, or between or among the witnesses, will affect the prosecution case. It is only when such contradiction or inconsistency is material and fundamental and relates to the main issue in question, and has not been satisfactorily explained, that it will create doubt in the mind of the Court as to the guilt of the accused see (*Richard Munene v Republic* [2018]eKLR). We are of the considered view that the prosecution case was emphatic and cogent, and was not founded on any contradictions and inconsistencies. The appellant's claim that he had been framed was carefully examined by both courts and properly discounted as not worthy of credit.
12. We further find that the claim that the appellant's constitutional right to a fair and impartial trial was violated and his attack on the legality and constitutionality of the sentence were grounds that were not raised for determination by the first appellate court, and therefore cannot find or merit consideration by this Court on second appeal.
13. In conclusion, we find that the appeal has no merits. The appellant was properly convicted and sentenced. The appeal is therefore dismissed in its entirety.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF NOVEMBER 2023.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify this is a true copy of the original.

Signed

DEPUTY REGISTRAR

