King'oo v Republic (Criminal Appeal 120 of 2022)
[2023] KECA 1328 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KECA 1328 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 120 OF 2022

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

NOVEMBER 10, 2023

BETWEEN

MOSES MUJLI KING'OO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Mombasa delivered on 26{{^th}} April 2019 by Hon Lady Justice Njoki Mwangi in High Court Criminal Appeal No 69 of 2018 Original Kwale CM Criminal Case SO 911 of 2010)

JUDGMENT

1. This is a second appeal from the judgement of Njoki, J in Mombasa High Court Criminal Appeal No. 69 of 2018 in which the learned Judge dismissed the appellant's first appeal from the judgement in Kwale Chief Magistrate's Criminal Case No. SO 911 of 2010. Before the trial court, the Appellant was charged, in the first count with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act*. He faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that during the month of February, 2010 in Kwale County within Coast Region unlawfully and intentionally committedan act which caused his penis to penetrate into (sic) the vagina of MM [name withheld] a girl aged 12 years. He was sentenced to life imprisonment.

2. The appellant and JMM jointly faced the 2nd count of supplying drugs and instruments to procure abortion contrary to Section 160 of the *Penal Code*.

3. When the charges were read to the appellant and his co-accused, they pleaded not guilty, and they were taken through trial where 4 witnesses testified for the prosecution and the appellant with his co-accused testified with one witness for the defence.

4. Due to the confusion in the trial court's record regarding the manner in which the witnesses were identified, apart from the Complainant who we will refer to as PW1, the rest of the witnesses we shall refer to by their relationship to the Complainant or in their official capacities or names.

5. The evidence tendered before the trial court was that PW1, MM, a primary school pupil in class 6 at a Primary School was, in sometimes in February 2010 at 10:00 a.m., called by the appellant, her Science Teacher to his house and asked her to collect some clothes from his house; that when she entered the house she did not see any clothes; that the appellant followed her into the house, pulled her to the bed, removed his shorts, removed her pants and forced her legs open before inserting his penis in her private parts and had sex with her; that after that the appellant told her to go home and warned her not tell anyone about the incident; that after two weeks when she went to wash clothes at a River, the appellant appeared, pulled her to a nearby bush and had sex with her; and that on a third occasion, the appellant forced her into sex again.

6. In the month of March 2010, PW1 developed illness and her mother became suspicious and took her to a dispensary for a pregnancy test but it was not done as there was no equipment to test her. On a 2nd occasion, PW1, in the company of PW2 and the appellant and the appellant's wife boarded a matatu for Msambweni District Hospital where PW1 was to undergo a pregnancy test. On the orders of the appellant, the matatu they were in bypassed the said Hospital and they went to Ukunda where they alighted. The appellant telephoned JMM who appeared and took her to a certain house where he inserted a metal object in her vagina. He then pricked her with the metal object and she felt pain and also injected her on her buttocks. While that was happening, her mother and the appellant's wife had been ordered to stay a distance away from that house.

7. It was PW1's evidence that before JMM inserted the metal object in her vagina, she panicked when she saw Doctor's equipment in the room she had been taken to and after she was ordered to lie on a bed. She got out of the bed crying and tried to get out of the room but the appellant blocked her exit and was once again ordered to lie on the bed. On reaching home she started bleeding heavily. Her mother complained to the appellant who told her not to worry.

8. The following day her mother took her to Msambweni Police Station and to Msambweni District Hospital. She was examined and admitted for a day. The Doctor said she had an incomplete abortion. She identified her P3 form and treatment notes in court.

9. PKC, a Clinical Officer at Msambweni District Hospital testified that he examined PW1, a 12 year old girl on 23rd April, 2010 following allegations of defilement that had happened in February, 2010; that he noticed that her hymen was missing; that an ultra sound test revealed a missed abortion of 6 weeks and revealed that there was a dead foetus in her uterus; that a laboratory test revealed that she had syphilis; and that the foetus was removed through vacuum aspiration. He produced the P3 form and ultra sound test report as exhibits.

10. PW1's mother, VN, testified that PW1 was aged 14 years and some months as at the time she was testifying in court on 14th March, 2013. She could not recall the year PW1 was born as her clinic card was at home. She however indicated that PW1 was 12 years old in the year 2010. According to her, PW1 missed her periods in the months of February and March, 2010; that she realised this when PW1 did not request for sanitary pads; that when asked about it, PW1 kept quiet; that PW1 developed a strange appetite for sour food like mangoes and had morning sickness; that she took PW1 to a clinic where the Doctor gave her some medicine and recommended a pregnancy test; that that evening when she interrogated PW1, PW1 at first was reluctant to reveal to her the truth but later told her that the appellant had had sex with her; that the mother went to the appellant's house and he

agreed to discuss the matter with her after admitting having had sex with PW1 on 3 occasions and he agreed to accompany them to Hospital to confirm if PW1 was pregnant. What happened thereafter is substantially the same as what PW1 narrated.

11. However, when the appellant, PW1 and Jackson Mulinge Mutie returned from where they had gone, the appellant gave her Kshs. 200/= for fare. On the way home, PW1 narrated to the mother what had taken place and that on arrival at their home, she heard PW1 sobbing from her room. On entering the room, she saw a lot of blood trickling down PW1's legs. She became alarmed and went to see the appellant who said he had no more money to spend. The mother then sought assistance from her sister who accompanied her and PW1 to Msambweni Police Station. A Police Officer took them to Msambweni District Hospital where a Doctor told them that PW1 had had an incomplete abortion and PW1 was treated. In the meantime, the appellant went underground for some time but was traced after a few months.

12. EK, the sister to PW1's mother testified that on the night of 22nd April, 2010, PW1''s mother told her that she wanted to take her child who was sick to Hospital. She went to see PW1 who told her she had been unwell and her stomach was aching. EK said that because of a certain smell, she thought that PW1 was having her periods but did not know. PW1 explained to EK the way the appellant had taken her for treatment. EK realized that PW1 had been taken for an abortion. They went to the Police Station to report and then to Msambweni District Hospital. The Doctor noted that an abortion had failed. PW1 told them that the appellant is the one who had impregnated her. EK said that she knew the appellant and he ran away when they pressed charges against him.

13. At the close of the prosecution's case, the appellant was placed on his defence in which he denied commission of the offences and lamented that he was arrested on trumped up charges. He revealed that there was a land dispute between his and the victim's family and pointed out that the victim's oral evidence contradicted her witness statement. He called, as DW2, Maureen Josiah told court that PW1 and her family were envious of the appellant's job; that they told her that one day the appellant would be without a job. DW3, Jackson Mulinge Mutie admitted attending to PW1 in April 2010 at a health clinic in Ukunda; that he administered Panadol as well as an injection to her to treat a threatened abortion. He denied supplying instruments or giving Pw1 instruments to induce an abortion.

14. The learned trial magistrate, vide judgement delivered on 31st August 2017, found that PW1 was proven a minor of 12 years vide the clinical officer and PW1's mother's evidence; that there was a sexual encounter between the appellant and PW1; that the appellant accompanied PW1 to a clinic so as to procure an abortion.

15. Accordingly, the appellant was found guilty of the offence of defilement and convicted accordingly. After considering mitigation, the appellant was sentenced to serve life imprisonment. In respect of the 2nd count, the court was convinced that the appellant and his co- accused conspired to have PW1 miscarry and ought to have been charged under Section 158 of the Penal Code and not Section 160 of the Penal Code. The appellant and his co-accused were acquitted and it was directed that a copy of the judgement be sent to the Director of Medical Services and the Clinical Officers Council for administrative action.

16. The appellant was dissatisfied with the decision of the learned magistrate and appealed to the High Court at Mombasa on the grounds that the prosecution did not prove its case; that the prosecution evidence was contradictory; that the appellant's defence was not considered; that Section 214 of the *Criminal Procedure Code* was not considered; that the sentence meted on the appellant was harsh and excessive; that the charge before the court was duplex; that the evidence of Pw1 to Pw3 was at variance

with the medical evidence on the P3 form; and that the trial was conducted contrary to Section 137(f) of the *CPC* and Article 50(2)(b) of the *Constitution*.

17. Njoki Mwangi, J vide the impugned judgement found that PW1's evidence as corroborated by the P3 form proved her age as 12 years; that penetration was proven vide PW1's testimony as corroborated by the medical evidence and the mother; that there was no reason to impugn the charge sheet for failure to include the date, time and place of the offence; that the provision of the law that the appellant was charged of were indicated and no charges were combined; that that the particulars of the charge were sufficient for him to understand the charge brought against him and the place that it occurred; that the appellant was represented by counsel, who ought to have objected to the defect in the charge sheet before the trial court; that the infraction in the date of the offence is curable under Section 382 of the *CPC*; and that there was no merit in the appellant's defence, which was seen to be full of falsehoods.

18. The appellant was convicted under Section 8(1) as read with 8(3) of the *Sexual Offences Act* after it was found that the offence was proven under that provision as opposed to Section 8(1) as read with Section (2) under which the appellant was charged. The life sentence was set aside and substituted with a 20 year sentence to run from the date of sentence, being 3rd October 2017.

19. The appellant was dissatisfied with the decision and lodged this appeal in which he contends that he was not afforded a fair trial; that the court did not comply with Section 151 and 302 of the *CPC* and Section 36(1)(6) of the *Sexual Offences Act*; that the appellant's defence was not considered; and that age was not proven. It was sought that the appellant be set at liberty after the conviction is quashed and sentence set aside.

20. We heard this appeal on the Court's virtual platform on 20th June, 2023 when the appellant appeared in person from Shimo La Tewa Prison while learned counsel, Mr Alex Gituma, Principal Prosecution Counsel, appeared for the respondent.

21. In the appellant's submissions, the age of PW1 was not proved and having not been proved the learned Judge erred in substituting the conviction under subsection (2) of section 8 of the *Sexual Offences Act* with that under subsection (3) of the same provision; that there was no compliance with Section 200(3) of the *Criminal Procedure Code* as the appellant was denied an opportunity to recall PW1 for further cross-examination; that there was no compliance with Section 151 and 302 of the Criminal Procedure Code regarding the mode of examination of witnesses; and that there was misconstruction of section 8(3) of the *Sexual Offences Act* as regards the mandatory minimum sentences.

22. In response, the respondent submitted that it was not true that the appellant was denied a fair trial and that the prosecution did not prove its case; that every witness was examined on oath in line with Section 151 of the *CPC*; that the appellant's defence was extensively considered; that Section 302 of the *CPC* was complied with as indicated the record; that age of PW1 the was proved; that DNA was never an issue before the trial court and that this grounds could not be belatedly raised on appeal.

23. We have considered the said submisions.

Analysis and Determination

24. In a second appeal such as this, our mandate under Section 361 of the *Criminal Procedure Code* is limited to a consideration of matters of law only. In *Karani vs. R* [2010] 1 KLR 73 the Court express that:

> " 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."

25. As already stated, the appellant took issue with the trial magistrate's handling of another criminal file involving the appellant. This is an issue that was not raised before the High Court. This Court in *Alfayo Gombe Okello v. Republic* [2010] eKLR had this to say about the issue:

> "....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

26. The predecessor to this Court in *Alwi Abdulrehman Saggaf vs. Abed Ali Algeredi* [1961] EA 767 held that the course of taking a point of law, which has not been argued in the court below, on appeal ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

> " The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below."

27. There is however a limited avenue where the decision in question is manifestly contrary to the law or the *Constitution* such as where the sentence imposed is manifestly illegal since a Court of law cannot close its eyes to a manifest illegality since this Court is bound by the National Values and Principles of Governance in Article 10 of the *Constitution* which oblige us, in interpreting any law, to inter alia, be bound by the rule of law.

28. It was contended that the age of PW1 was not proved. This being a second appeal we are precluded from revisiting the concurrent findings of fact of the two courts below. We cannot therefore interfere with the finding of the learned Judge that PW1 was aged 12 years. Regarding the issue of recall of witnesses upon the trial magistrate leaving service, we must emphasise that what the law provides is the right to apply for the recall of the witness as opposed to the right to recall the witness. The ultimate decision whether or not to recall a witness remains with the trial Court and unless it is shown that the decision was wrongly arrived at the appellate court would not interfere with that decision. Again, we must point out that this issue was not expressly taken up before the first appellate Court and therefore there is no basis upon which we can fault the High Court on that issue. This applies to the issue of the contravention of Sections 151 and 302 of the *Criminal Procedure Code*. In any case, the examination complained of was at the instance of the appellant's co- accused with regard to the charge for which both the appellant and his co-accused were acquitted. Therefore, that omission was curable under section 382 of the *Criminal Procedure Code* as no prejudice was caused to the appellant.

29. As regards the sentence, the appellant was sentenced to life imprisonment which was then reduced by the High Court to 20 years imprisonment. While the courts have expressed reservations regarding mandatory minimum sentences, we are not prepared to hold that the length of the sentences prescribed is unconstitutional.

30. We have considered the sentence meted herein and we are not prepared to interfere with it. This was a case where not only was PW1 subjected to an ordeal of defilement, but had to undergo an unsuccessful abortion thus aggravating the matter.

31. Accordingly, we find no merit in this appeal which we hereby dismiss both on conviction and sentence.

32. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF NOVEMBER, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Singed

DEPUTY REGISTRAR