Mwinzi v Republic (Criminal Appeal 61 of 2014)
[2022] KECA 12 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 12 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 61 OF 2014

MSA MAKHANDIA, S OLE KANTAI & KI LAIBUTA, JJA

FEBRUARY 4, 2022

BETWEEN

JOHN MWINZI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Garissa (Mutuku, J.) dated 28th November, 2013 in HC. CR.A. No. 46 of 2012)

JUDGMENT

1 This is a second appeal by the appellant, John Mwinzi, who was convicted on the main charge of defilement contrary to Section 8(1) as read with sub-section 4 of the *Sexual Offences Act*. Particulars were that on the 26th day of August, 2010 at a place in the then Eastern Province he committed an act which caused penetration of his penis into the vagina of RM, a child aged 10 years. He was convicted after the trial where the prosecution called 7 witnesses and sentenced to imprisonment for life. His appeal to the High Court of Kenya at Garissa was dismissed by Mutuku, J. in a Judgment delivered on 28th November, 2013.

2 We are mandated by Section 361(1) (a) of the *Criminal Procedure Code* to consider only issues of law but not matters of fact which have been tried and retried by the trial court and the appellate court on first appeal – See *Peter Ngure Mwangi v Republic* [2014] eKLR where it was held in respect of that mandate:

> "This being a second appeal, our mandate is as set out in Section 361 of the Criminal Procedure Code, namely to deal with issues of law."

3. We visit the facts only for purposes of satisfying ourselves whether the two courts below carried out their mandates as required in law.

4. According to the prosecution, RM (PW1) a class 4 10-year-old pupil at a local school was sent by her parents to herd goats and, while she was doing so the appellant, who worked in their home as a domestic servant, approached her and invited her to accompany him to the river. She refused. He took her by the arm, threw her to the ground, removed her clothes, undressed himself and in her own words:

> " ... he slept on me.... I felt pain."

5. She rushed home and, after some hesitation, she reported to her mother all that had happened to her. Her mother (PW3 – LM) informed others and a report was made to the local administration (Assistant Chief Esther Syombua

6. Ngongo (PW2) and Chief Titus Mutuli (PW4)) who arrested the appellant and handed him over to Tseikuru Police Post.

7 RM was taken first to Tseikuru Police Post and then to Tseikuru Sub-District Hospital where she was examined and according to Clinical Officer Eunice Kiema (PW6), there was a whitish discharge with injuries in vagina area, there were multiple bruises on both labia and the hymen was broken.

8. Thomas Kinyanja of the said Police Post who investigated the case produced in evidence skirt which was sperm stained.

9. Put on his defence after the trial court found that a prima facie case had been established by the prosecution, the appellant, in an unsworn statement stated that on the material day he went to the mother and asked her to pay him money which she owed him but he was not paid. That evening, while visiting his aunt he was arrested and detained by police for an offence he knew nothing about.

   That was the case on which the appellant was convicted and his first appeal dismissed.

10. In the homemade "Memorandum Grounds of Appeal" filed on 10th December, 2018 the appellant complains that the Judge "...erred in law by relying on the evidence which fell too short of the certainty required in cases of sexual assault"; that the Judge erred in law by failing to draw an adverse inference on contradictions in the prosecution evidence; that the case was not proved to the required standard and there is a complaint that Section 169(1) Criminal Procedure Code was not complied with ".... in relation to my defence statement ....".

11. We discern the only point of law running through the grounds raised by the appellant to be whether the case by the prosecution was proved to the standard required in law. Section 169(1) of the said Code relates to contents of Judgment and going by the judgments of the two courts below, we are satisfied that the same are as required in law and cannot be impeached at all.

12. Was the case proved to the required standard?

    The High Court reviewed the record as it was required to do and found that the case against the appellant was proved beyond reasonable doubt. We have reviewed the record and have reached the same conclusion. The case was simple as there was no issue about identification or whether defilement had taken place. The appellant, who worked in the home of the complainant attacked RM by throwing her to the ground and defiling her. There was no issue as to identification as RM knew the appellant who worked in their home. RM immediately went home and informed her mother about the happenings; her mother examined her and found evidence of sexual assault and defilement was proved through the evidence of RM, her mother and the Clinical Officer who testified and produced a duly completed P3 Form. The appellant's defence was diversionary as it related to money allegedly owed to him. This had nothing to do with the serious case that he faced where it was proved that he had defiled the complainant. This appeal has no merit and we dismiss it.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

……..

JUDGE OF APPEAL

DR. K.I. LAIBUTA

…….

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR