Mutwiri v Republic (Criminal Appeal 5 of 2017)
[2022] KECA 471 (KLR) (18 March 2022) (Judgment)

Neutral citation: [2022] KECA 471 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 5 OF 2017

HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

MARCH 18, 2022

BETWEEN

HASSAN MUTWIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Meru (Kiarie Waweru Kiarie, J.) dated 19th December 2016 in HCCRA No. 15 of 2013)

JUDGMENT

1. The brief background of this appeal is that the appellant was charged in the Chief Magistrate's Court at Meru in Criminal Case No. 325 of 2011 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, 2006. The particulars of the offence were that on 20th April 2011 at Makoondo area in the Imenti North District within Meru County, he intentionally caused his penis to penetrate the vagina of FM (a child aged 4 ½ years). In the alternative, the appellant was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, 2006. The particulars of the alternative charge were that, on the date and at the place aforesaid, the appellant intentionally touched the anus of FM with his penis.

2. The appellant denied both the principal and alternative charge whereupon the matter proceeded to trial with the prosecution calling 4 witnesses.

3. The victim (PW1) told the trial court how the appellant lured her to accompany him, promising to buy her a cake. She followed him towards the road. The appellant then took her into a nappier grass plantation behind her mother's house, pulled down her pants, laid her on the ground and defiled her. She screamed, and her mother, KM (PW2), came to her rescue. When she approached, the appellant ran away.

4. KM (PW2) knew the appellant, who she said used to visit her cousin. She told the court that, at about 7.00 p.m, she heard a child screaming in a nearby nappier grass plantation. On approaching, she saw a man, who she could not recognise in the dark, running away. She found her child (PW1) crying. She told her mother that the appellant, whom she knew, had taken her into the nappier grass plantation. PW2 took the child to Meru Police Station where she reported the incident. The accused was arrested by members of the public and escorted to the police station.

5. On examining the child, Dr. Robert Natio (PW3) noted tear on the child's labia majora with bleeding and clots, and with blood on the vaginal openings. The doctor formed the opinion that the child had been defiled. He completed a Medical Examination Report (P3 Form), which was produced as evidence of the defilement. However, the appellant was not examined.

6. PC Janet Ayabei (PW4), who was at the time attached to Meru Police Station, received the initial report on 20th April 2011 at about 7.30pm when the complainant and her mother went to the station. The appellant was also brought to the station by members of the public. PW4 noted that the appellant had a stab would, which confirmed PW2's testimony that the appellant had wounds inflicted by members of the public who apprehended him.

7. In his defence, the appellant gave a sworn statement, but did not call any witnesses. According to him, he had gone to PW2's house to drink alcohol after which PW2 allegedly claimed that he had not paid her. He told the court that a fight ensued between the two whereupon PW2 stabbed him on the back; that he ran to Meru Police Station to make a report; that he found PW1 and PW2 at the station; and that it is then that he was arrested. The appellant denied committing the offence and alleged that he was framed by PW2 following their disagreement over money.

8. In his judgment, the Principal Magistrate (D.W. Mburu) found the appellant guilty and convicted him of the principal charge of defilement contrary to section 8(1) of the *Sexual Offences Act*, 2006. Accordingly, he sentenced him to life imprisonment as mandated by section 8(2) of the Act.

9. Dissatisfied with the conviction and sentence, the appellant appealed to the High Court in Meru HCCr Appeal No. 15 of 2013 on the grounds *inter alia* that the trial magistrate erred in both law and fact: in failing to observe that the prosecution had not proved their case to the standard required by law; by failing to observe that the medical evidence adduced did not connect the appellant with the offence in question; by failing to observe that the witnesses were mother and daughter, and that no other person from outside the family testified; by failing to resolve "material contradiction riddled with the prosecution case in favour of the appellant;" and by failing to give due consideration to his defence.

10. The appellant filed written submissions on which he relied in support of his appeal, requesting the court to allow his appeal. In response, learned State Counsel (Mr. Odhiambo for the Director of Public Prosecutions), also filed written submissions, which he highlighted orally urging the court to dismiss the appellant's appeal. Having re-evaluated the evidence adduced at the trial, and having carefully considered the grounds on which the appellant's appeal was founded, the appellant's written submissions together with the written and oral submissions of the learned State counsel, the High Court (Kiarie Waweru Kiarie, J.) delivered its judgment on 19th December 2016 dismissing the appellant's appeal. In his judgment, the learned Judge upheld both conviction and sentence as pronounced by the trial court.

11. Aggrieved by the judgment of the High Court (Kiarie Waweru Kiarie, J.), the appellant instituted this appeal on 4 grounds as set out in his undated

> "Grounds of Appeal". The same are subsumed in his subsequent but undated "Supplementary Grounds of Appeal" filed on 1st February 2022, most of which are argumentative in the nature of submissions. Accordingly, we take the liberty to summarise and reframe the 7 grounds as follows: that the learned Judge erred in law when he upheld the appellant's conviction and sentence without noting that the evidence of PW1, being a single eyewitness, was inconsistent and contradictory in comparison to PW2, PW3 and PW4's sworn testimonies, thus invoking section 163(1) of the *Evidence Act* (Cap. 80 Laws of Kenya); that the charge sheet was defective contrary to section 214(1) of the Criminal Procedure Code; that crucial witnesses did not give their evidence contrary to section 150 of the *Criminal Procedure Code*; that PW4's evidence was inconsistent in proving the allegations, and no DNA test was conducted on both the appellant and the complainant in proof of the allegations, thus invoking section 36(1) of the *Sexual Offences Act*; that there was a persisting feud between the appellant and PW2, which led PW2 to frame the appellant using her daughter; that the appellant's defence was not considered as required under section 161 of the Criminal Procedure Code; and that section 72(3) (b) of the Retired Constitution and Article 49(1) (f) of the new Constitution were violated on account of the appellant having been held in police custody for six days well beyond the maximum of 24 hours provided in *the Constitution*, before being arraigned in court for plea.

12. In support of his second appeal to this Court, the appellant filed undated written submissions on 1st February 2022 and adopted them at the hearing. He urged us to allow his appeal. By way of oral submissions, learned State counsel (Mr. Masila) opposed the appeal and prayed that the appeal be dismissed.

13. This Court's mandate on a second appeal is conferred by Section 361(1)(a) of the Criminal Procedure Code, which provides:

> "361 (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—
>
> a. on a matter of fact, and severity of sentence is a matter of fact."

14. The jurisdiction of this Court on a second appeal, as is the case here, has been the subject of judicial pronouncements in various cases, such as *Stephen M'Irungi& Another v Republic* [1982-88] 1 KAR p.360 where it was held:

> "Where a right of appeal is confined to questions of law only, 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 law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

15. We also agree with what this Court had to say in *Samuel Warui Karimi - V Republic* [2016] eKLR:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

16. Having carefully considered the proceedings at the trial court, the record of appeal in the High Court and in this Court, the grounds on which that appeal and the appeal before us are based, and the respective submissions of the parties, we find nothing in the proceedings before the two courts below to suggest that the concurrent findings of fact in the two courts were based on either no evidence or on misapprehension of evidence. Neither do we find anything to lead to the conclusion that the trial court and the High Court acted on wrong principles in making the findings of evidence leading to the appellant's conviction and sentence, and the subsequent decision to dismiss his first appeal. Accordingly, there is nothing on record to warrant our interference with the lower courts' concurrent findings of fact. In the circumstances, we confine ourselves to the points of law raised in the appellant's 2nd appeal to this Court.

17. In view of the foregoing, the appellant's attempt to fault the learned Judge's decision on the grounds that the evidence of PW1, being a single eyewitness, was inconsistent and contradictory in comparison to that of PW2, PW3 and PW4's sworn testimonies, cannot stand. This is not the forum for impeachment of the credit of any of the witnesses who testified at the trial. To challenge the concurrent findings of evidence by the two courts below pursuant to section 163(1) of the *Evidence Act* (Cap. 80) comes too late in the day. Accordingly, that ground fails.

18. For the avoidance of doubt, the proviso to section 124 of the *Evidence Act* (Cap. 80) provides in part that:

> " ... where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

19. The same fate befalls the ground that PW4's (the doctor's) evidence was inconsistent in proof of the allegations, and no DNA test was conducted on the appellant and the victim (PW1) in proof of the allegations of defilement. To our mind, section 36(1) of the *Sexual Offences Act* (which is couched in discretionary terms) does not mandate the trial court to call for a DNA test to ascertain whether or not the accused person committed an offence. In its wisdom, the Legislature so decided, and for good reason.

20. In *Mark Oiruri Mose v R*. [2013] eKLR where this Court observed:

> " Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ"

21. With regard to the appellant's submission that certain "crucial" witnesses were not called to testify, we can only say that the prosecution calls those witnesses it considers necessary to support the charge.

Article 50(2) of the Constitution provides that "every accused person has the right to a fair trial," which includes the right "... (k) to adduce and challenge evidence."

This court is alive to the fact that there is no legal requirement in law on the number of witnesses required to prove any particular fact. That is the essence of Section 143 of the *Evidence Act*, which provides that "no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

22. In *Keter v Republic* [2007] 1 EA p.135, the court held inter alia that:

> " The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

23. As regards the appellant's defence, which he claims was not considered, we chose to differ, but lend our attention in so far only as the claim raises the issue of the right to fair trial guaranteed by Article 50 of *the Constitution*. The record before us is evident that the trial court took into account his defence and, accordingly, we find nothing to fault the two courts below in reaching their concurrent findings of fact on the matters to which the appellant testified on oath.

24. Still on issues of evidence, the appellant claims that he was framed in the face of a feud between him and PW2, which borders on a claim in tort, but which does not in any way erode the weight of evidence considered by the two lower courts in arriving at their respective decisions. Suffice it to observe that the appellant has a right of action in tort for whatever might have been done to "frame" him as alleged and, of this, we say no more.

25. The appellant also faults the learned Judge in failing to find and hold that section 72(3) (b) of "the retired Constitution" and Article 49(1) (f) – relating to his rights as an arrested person – were violated. According to him, he was held in police custody for a period of 6 days before being arraigned in court to take plea. We hasten to observe that this is the first time this allegation is made. We find nothing on record to suggest that he had made such a complaint at the trial. Yet, that is the forum at which that complaint should have been raised. Suffice it to observe that such a complaint cannot be the subject of determination on second appeal unless it was the subject of trial and appeal in the two courts below. In any event, the appellant is at liberty to pursue appropriate remedies in the right forum independent of this appeal, which cannot stand on that ground.

26. Moreover, even if that ground were to hold, it cannot be a basis for acquittal. This Court in *Fappyton Mutuku Ngui v Republic* [2014] eKLR held that –

> " The correct position in law was set out in Julius Kamau Mbugua v Republic (2010) eKLR where the Court stated that the violation of the appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights."

27. Finally, the appellant claims that the charge sheet on the basis of which he was charged, tried, convicted and sentenced was defective. Be that as it may, the defect, if any, was curable under Section 382 of the Criminal Procedure Code, and was in fact cured. It is noteworthy that the defect complained of was the phrase "... defilement contrary to section 8(1) and (2) of the *Sexual Offences Act* ..." which was corrected by the High Court to read: "... contrary to section 8(1) as read with section 8(2)". The pertinent question is what effect (if any) such a defect has on the proceedings.

28. In answer to this question, section 382 of the Criminal Procedure Code provides in part:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:..."

29. In the same vein, the Supreme Court of India in *Willie (William) Slaney v State of Madhya Pradesh* [A.I.R. 1956 Madras Weekly Notes 391], held that:

> " Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

30. We are of the considered judgment that no failure of justice occurred in this case. The defect complained of was inconsequential and, in any event, was corrected. Accordingly, this, like other grounds of appeal, cannot stand as no prejudice was occasioned at the trial by that minor defect.

31. As regards the sentence this being a second appeal under section 361(b) of the Criminal Procedure Code, this Court only has jurisdiction to hear an appeal against sentence where the sentence was enhanced by the High Court or the trial magistrate had no power to pass the sentence. In this instance the sentence of life imprisonment was imposed upon the appellant by the trial magistrate who took into account the appellant's mitigation and the circumstances of the offence. The trial magistrate had the power under section 8(2) of the *Sexual offences Act* to impose the sentence. We do not therefore find any reason to interfere with the sentence

32. Having considered the evidence on record, the judgment of the trial court and of the High Court (Kiarie Waweru Kiarie, J.), the grounds on which the appeal before us is made, the written submissions of the appellant and the oral submissions of learned State counsel, we find that the appellant's appeal herein on both conviction and sentence fails and is hereby dismissed. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

HANNAH M. OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR