Imbaga v Republic (Criminal Appeal 65 of 2016)
[2022] KECA 924 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 924 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 65 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

JUNE 24, 2022

BETWEEN

ZACHARIA OGOLA IMBAGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega (R. Sitati, J.) dated 4th February, 2016 in HCCRA NO. 91 OF 2013)

JUDGMENT

1. The appellant was charged with defilement of a girl contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence are that on 8th July, 2010 in Demesi sub-location Vihiga District within the former Western Province, he unlawfully and intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of CM (minor), a girl aged 10 years.

2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

3. The appellant denied the charges leading to a trial in which the prosecution called 5 witnesses in support of its case. The minor testified as PW1 and narrated that on the fateful day at around 6.45 am she stepped out of her grandmother's house to go for a short call. On her way, she met the appellant, who is her uncle, and he led her to his house which was in the same compound as her grandmother's. The minor explained that the appellant laid her on his bed, removed her pantie and defiled her. The minor explained that she felt pain and cried. The appellant then told her to lie to her grandmother that she had fallen off a tree. However, the minor did not follow the instructions of the appellant and proceeded to narrate the heinous ordeal to her grandmother, Stella Mugaduka Malongo, PW2. PW2 testified that upon examining the minor's vagina she discovered that it was swollen and was oozing blood.

4. PW3, Mary Akinyi Matongo, who works as a member of the Area Advisory Council in the Children's Department was immediately informed of what had befallen the minor. When she visited PW2's home she found the minor writhing in pain while crying. She also confirmed that the minor's vagina was swollen and bleeding. She proceeded to take the minor to the hospital where she was admitted for five days. These testimonies were corroborated by that of Sammy Chelule, PW5, a Senior Clinical Officer in charge of the Sexual Violence and Gender Clinic who filled and later produced the P3 form which confirmed that the minor had indeed been defiled.

5. At the close of the prosecution case, the learned Senior Resident Magistrate found that the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement and denied defiling the minor. He claimed that he was informed that the minor fell from a tree. He further stated that he was framed because of the bad blood between his family and the minor's. Even though they lived in the same compound with PW2, who is his step-mother, they did not co-exist peacefully because they had land issues.

6. The trial Magistrate evaluated the evidence tendered before the court and found the appellant guilty as charged and sentenced him to life imprisonment.

7. Aggrieved by the conviction and sentence, the appellant appealed to the High Court on 7 grounds. Sitati, J re-evaluated the evidence on the record and delivered judgment on 4th February, 2016 dismissing the appeal in its entirety. The learned judge upheld the sentence meted on the appellant by the trial court.

8. Still aggrieved, he preferred the instant appeal based on 9 grounds, which we summarize as that the judge erred in law by;

    a. Failing to consider the provision of Section 169 of the Criminal Procedure Code.

    b. Failing to appreciate the inconsistencies in the prosecution's case.

    c. Failing to hold that the prosecution failed to discharge its burden of proving its case beyond a reasonable doubt.

    d. Failing to properly evaluate the evidence on record.

    e. Failing to consider that the sentence meted on the appellant was excessive and inhumane due to its mandatory nature.

9. During the hearing of the appeal, the appellant appeared in person while the respondent was represented by Mr. Shitsama, the learned Prosecution Counsel.

10. The appellant submitted that the prosecution case was riddled with inconsistencies hence his conviction was unsafe. The perforation of the hymen alone should not have been the basis for his conviction. The High Court failed on its duty to interrogate the reliability of the minor's testimony and the corroboration of the rest of the witnesses. He further faulted the trial court for shifting the burden of proof to the appellant without considering the merits of Section 169 of the Criminal Procedure Code. The trial Magistrate ought to have assisted the appellant by calling his mother to testify to his alibi as this was essential to the just adjudication of his case. Furthermore, the testimony of the appellant was ignored to his detriment. Finally, he pleaded with this Court for leniency as he is old, and therefore harmless to the society, and is also remorseful. He relied on the holding of the Supreme Court in *Francis Karioko Muruatetu & another -vs- Republic & another* [2017] eKLR.

11. Mr. Shitsama submitted that the inconsistencies in the prosecution case were not so glaring as to preclude the fact that the appellant was the one who committed the crime. Moreover, the learned Judge, after considering the said inconsistencies, held that they were immaterial. Further, the learned Judge re-evaluated the evidence presented before the court and considered the submissions made as required by law. In the end, she upheld the sentence meted out against the appellant. Counsel submitted that the sentence is not harsh or excessive as it is one that is prescribed by the law and the court had no alternative but to mete it.

12. This being a second appeal, the Court restricts itself to consideration of questions of law only by dint of Section 361(a) of the Criminal Procedure Code. This was affirmed by the holding of this Court in *David Njoroge Macharia -vs- Republic [2011] eKLR;*

> "That being so only matters of law fall for consideration–see section 361 of the Criminal Procedure Code. As 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 *Chemagong v. R [1984] KLR 611.*"

13. The appellant's grounds of appeal in the main complained about the failure of the two courts to evaluate and re-evaluate the evidence on record; failing to appreciate the inconsistencies in the prosecution's case; and as a result failing to hold that the prosecution did not discharge its burden of proof as it did not prove its case beyond a reasonable doubt.

14. In addition, the appellant criticized the sentence meted out against him and termed it harsh and excessive. He sought this Court's intervention whilst relying on the pronouncement by the Supreme Court in *Francis Karioko Muruatetu & another -vs- Republic & another (supra)*. On this ground, we associate ourselves with the holding of this Court in *P (Not His Real Name) -vs- Republic (Criminal Appeal 106 of 2019) [2021] KECA 357 (KLR) (17 December 2021) (Judgment);*

> "As regards the appeal against sentence, under section 361(1) of the Criminal Procedure Code, this Court's jurisdiction is limited to considering an appeal on matters of law only, and severity of sentence is a matter of fact, not law..."

15. In the end, we find that the appellant was properly convicted of the offence of defilement as charged. Further, we are satisfied that the High Court re-evaluated and re-analysed the evidence before it. Considering the circumstances of the case in which the appellant defiled and severely injured his 10-year-old niece, we cannot fault the learned Judge for dismissing the appeal on sentence.

16. As a result, we find the appeal to be devoid of merit and we dismiss it in entirety.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR