Murea v Republic (Criminal Appeal 90 of 2019)
[2022] KECA 962 (KLR) (26 August 2022) (Judgment)

Neutral citation: [2022] KECA 962 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 90 OF 2019

AK MURGOR, S OLE KANTAI & A MBOGHOLI-MSAGHA, JJA

AUGUST 26, 2022

BETWEEN

STANELY MWITI MUREA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against the Judgment of (Gikonyo J.) delivered on 20th May, 2019 at the High Court of Kenya at Meru in Criminal Appeal No. 144 of 2018)

JUDGMENT

1. The appellant was charged before the Magistrate's Court at Tigania in Criminal Case No. 906 of 2015 with the offence of attempted rape contrary to Section 4 of the *Sexual offences Act*, and in the alternative he was charged with the offence of committing an indecent act with an adult contrary to section 11 A of the *Sexual Offences Act*.

2. The prosecution called three witnesses but the appellant did not offer any defence. After a period of about one year, the court on its own motion decided to close the trial after it observed that the appellant was not keen to present any defence. The trial court then wrote a judgment based on the evidence adduced, found the appellant guilty, convicted him on the main charge and sentenced him to 10 years imprisonment. The appellant was discharged on the alternative charge.

3. Aggrieved by the said conviction and sentence the appellant appealed to the High Court which upheld the conviction but reduced the sentence to 5 years imprisonment. Still dissatisfied by the judgment of the High Court the appellant appealed to this Court.

4. The memorandum of appeal filed by the appellant may be reduced to two main issues; the first being that both the trial court and the High Court failed to take cognisance of the fact that the Director Of Public Prosecutions had moved to terminate the proceedings against him under Article 157 (6) (c) and (7) of the *Constitution* and Sections 87 (b) and 211 of the *Criminal Procedure Code*. The other

issue raised by the appellant is that the evidence was full of contradictions and inconsistences which discredited the credibility of the prosecution witnesses.

5. When this appeal was called out for hearing on 9th May, 2022 Mr. Ochieng appeared for the appellant while Mr. Chelule appeared for the respondent. We observe that by the time that this appeal came up for hearing, the appellant had already served the sentence that had been imposed by the High Court. Through their counsel, both the appellant and the respondent had filed submissions to address us in this appeal. In addition to the said submissions, brief oral highlights were made during the hearing.

6. Our mandate in this second appeal is prescribed by section 361 (1) of the *Criminal Procedure Code* which provides as follows,

> " 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— on a matter of fact, and severity of sentence is a matter of fact."

7. In the case of *Karani vs. R* [2010] 1 KLR 73 this Court expressed itself as follows,

> " This is a second appeal. 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."

8. Further in *David Njoroge v Republic*, [2011] eKLR, this court stated that under section 361 of the Criminal Procedure Code,

> " Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong v Republic (1984) KLR 213".

9. PW 1 Judith Makena was in her house when the appellant called wanting to see her. Soon after the appellant arrived, he told her that his wife (appellant's wife) had alleged PW 1 and the appellant had an affair and that he (the appellant), wanted to make it a reality. The appellant then grabbed PW 1 and pinned her on the sofa. He unzipped his trouser and attempted to rape her.

10. A commotion ensued which attracted PW 2, Elizabeth Kagendo, who was doing some cleaning outside the house. On entering PW 2 encountered the appellant in a face off with PW 1 and saw the appellant zipping up his trouser. The appellant then insulted both PW 1 and PW 2 and walked out after picking cell phone earphones belonging to PW 1. A report was made to Miathene Police Station leading to subsequent arrest of the appellant. In the process of the trial, the appellant complained that PW 1's husband had made death threats to him following that incident. Those allegations however are not part of this appeal.

11. The other witness who gave evidence was PW 3, Corporal John Mathenge. This is the Police officer who received the report from the complainant, visited the scene and subsequently preferred charges against the appellant.

12. At the close of the prosecution case, the trial court found the appellant with a case to answer and set a defence hearing date. In the process however, the appellant made allegations against the prosecutor and the magistrate. In particular, he accused the magistrate of impropriety, and asked him to recuse himself. The trial magistrate however declined to do so. There is evidence that the Director of Public Prosecutions moved to terminate the prosecution of the appellant under Section 87 (b) of the Criminal Procedure Code which the trial court refused. The appellant moved to the High Court to review that order but the High Court refused to do so, thereby compelling the appellant to defend himself.

13. The evidence that was adduced before the trial court pointed to the culpability of the appellant and the witnesses remained firm under cross examination. We entertain no doubt whatsoever that the case against the appellant was proved beyond any reasonable doubt and that the conviction was based on sound evidence.

14. In his judgment dated 20th May, 2019 Gikonyo, J made an elaborate analysis of the evidence that was presented before the trial magistrate. He related the said evidence to the offences charged and was persuaded that the offence of attempted rape was proved beyond any reasonable doubt against the appellant. He believed the evidence of PW 1, the complainant, who was accosted by the appellant in her house and on raising an alarm her sister PW 2, came and found the appellant zipping up his trousers. He also addressed the issue of inconsistences but came to the conclusion that he was satisfied that the evidence of the complainant was corroborated by PW 2.

15. The offence of attempted rape is defined in Section 4 of the *Sexual Offences Act* and is a stand-alone offence. The learned Judge of the High Court properly observed that this is an inchoate offence, that is to say an offence, that requires an overt act to complete the actual offence. In this particular case, the actual offence would mean rape. The evidence of PW 1 was clear that the appellant pinned her on the sofa and unzipped his trouser. When PW 2 walked in she noticed the appellant zipping up his trouser. This was a clear demonstration that the appellant had intended to commit the offence of rape had it not been for the resistance by the complainant. The irresistible conclusion is that the offence of attempted rape was proved beyond reasonable doubt. In upholding the conviction, the High Court cannot be faulted.

16. The other complaint raised by the appellant was that he was denied the right to defend himself. Whereas it is true the Director of Public Prosecutions may terminate a prosecution, this may only be done with the consent of the court as provided under Article 157 (8) of *the Constitution*. For the avoidance of doubt this provision reads,

> " The director of Public Prosecutions may not discontinue a prosecution without the permission of the court."

17. Further, section 25 (1) of the *Office of The Director of Public Prosecutions Act* No. 2 of 2013 provides as follows,

> " The Director may with the permission of the court discontinue a prosecution commenced by the director, or any person or authority at any stage before the delivery of Judgment."

18. The move by the Director of Public Prosecutions to terminate the proceedings against the appellant was made before the trial court under Section 87 (b) of the Criminal Procedure Code. This move was rejected by the trial court which in a detailed ruling gave reasons for its decision.

19. For a period of one year the appellant did not offer any defence. The trial court on its own motion closed the trial and wrote the judgment leading to the conviction and sentencing of the appellant. In his judgment, the trial court magistrate had the following to say,

> "Having been placed on his defence the accused adopted petulant and belligerent stands culminating in his blatant refusal to make his defence when given the opportunity to do so thus consolidating the narrative given by the prosecution witnesses."

In view of the foregoing, the appellant cannot allege that the trial court denied him the right to be heard, after having been provided with several opportunities to defend himself, but declined to do so.

20. The issue of contradictions and inconsistences in the evidence of prosecution witnesses was addressed by the High Court which found that none existed. We are also of the same view, and nothing on the record has persuaded us otherwise.

21. On our own assessment of the record, we agree entirely with the learned Judge and have no reason to depart from his findings. It follows that the appeal is lacking in merit and therefore dismissed.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

DEPUTY REGISTRAR

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR