Njaramba v Republic (Criminal Appeal 37 of 2016) [2022] KECA 964 (KLR) (26 August 2022) (Judgment)

Neutral citation: [2022] KECA 964 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 37 OF 2016

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

AUGUST 26, 2022

BETWEEN

MARTIN MAINA NJARAMBA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nyeri (Mshila, J.) dated 21st July, 2017 in HC. CR.A. No. 1 of 2013)

JUDGMENT

1. This is a second appeal from the conviction of the appellant, Martin Maina Njaramba, by the Magistrate's Court at Mukurweini. The appellant had been charged before that court with the offence of defilement contrary to Section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006 particulars being that, on a day and place stated in the charge sheet he intentionally caused his penis to penetrate the anus of DMN, a child aged 4 years. He was tried by that Court, convicted and sentenced to life imprisonment and an appeal on both conviction and sentence was dismissed by the High Court of Kenya, Nyeri, in a Judgment delivered by Mshila, J., on July 21, 2016.

2. Being a second appeal our mandate is restricted in law to consider only issues of law if we find that any have been raised by the appellant. Section 361(1) (a) *Criminal Procedure Code* restricts that mandate on an appeal to us from the decision of a subordinate court to consider issues of law but not matters of fact. That mandate has been the subject of various decisions and pronouncements of this Court in such cases as *Stephen M'Irungi & Another v Republic* [1982-88] 1 KAR 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."

3. A brief visit of the facts of the case will assist in our reaching a determination whether the two courts below exercised their mandate as required by law.

4. On the morning of April 4, 2012 DW (PW2), mother of the complainant "DMN" (PW1) prepared him for school. He was a pupil in nursery school at a local school. The mother released her son, then aged 4 years, to PW (PW5),also a pupil at that school who was 6 years old. On the way to school the 2 children had to pass near the compound of the appellant, a person they both knew well as he was employed in a home near theirs. The appellant summoned the 2 children and while PW5 remained at the door, the appellant took PW1 to the front room, lay him on a bed, removed his clothes, unzipped his trousers and proceeded to sodomize PW1 who felt pain and cried out. When the appellant was finished he released the children who went to school but PW1 spent the day in pain and when he got home that day at 3 pm. he informed his mother that he had been sodomized by the appellant. The mother called her husband (PW3) who reported the matter to the authorities and the appellant was arrested on 20th April, 2012 at his home in Gichira where he had escaped to after the incident – this, according to the evidence of the investigations officer, Corporal Alfred Timbwa of Mukurweini Police Station.

5. David Kabuga, a registered nurse at Mukurweini District Hospital received PW1 on the same day of the incident (April 4, 2012) and upon examination found the anal region to be swollen and tender and there was echimosis and discoloration of the anal opening. He produced P3 Form into evidence.

6. The trial Magistrate was satisfied that a case had been made out by the prosecution and upon being called upon to answer the appellant stated in an unsworn statement that the whole case was fabricated; that he had travelled home upon being informed that his mother was sick and was surprised when he was arrested by police who were accompanied by a local church Pastor. According to him there were many fights at the home of the complainant and he was owed money by his former employer.

7. The trial Court considered the whole case and convicted the appellant and his first appeal was dismissed as we have seen. The appellant has come to us in this second appeal.

8. In a homegrown "Amended Grounds of Appeal" the appellant has raised 4 grounds to the effect that the 2 courts below erred by convicting him on prosecution evidence that he says was doubtful; that the courts below erred in convicting him on a defective charge; that his defence was not considered and that the courts below should have found that the prosecution was motivated by a grudge. He asks that we allow the appeal in its entirety.

9. When the appeal came up for hearing before us on a virtual platform on 9th May, 2022 the appellant was unrepresented and appeared from Nyeri Maximum Prison. Mr. Ngetich, learned counsel, appeared for the office of Director of Public Prosecutions. Both sides had filed written submissions which we have considered. The appellant in those submissions challenges the evidence of PW1 and says:

> " only do here-by (sic) beg leave of this Court contrary to Section 216 and 329 of the C.P.C. to invoke Article 50 (2) (b) of the *Constitution* for the revision of the harsh sentence that was imposed here-in (sic)."

The appellant then proceeds to address us in mitigation giving certain factors that have visited him in prison and concludes:

> “..... I have forgiven myself for being weak willed and frail in making wrong decision that has caused so much pain to me, my parents, siblings, the victim and her (sic) family and I continue to remain remorseful and I continue to remain remorseful for my action ”

Counsel for the respondent filed written submissions opposing the appeal.

10. We had earlier identified our mandate in a second appeal which does not allow us to deal with matters of fact. All the grounds of appeal raised we find to be on factual matters upon which the trial Court made findings and which were re-evaluated by the High Court on 1st appeal. The appellant’s defence was duly considered and was properly dismissed as it did not at all attempt to explain how PW2, as witnessed by PW5, ended up at his house early that morning where he committed what we must surely call by its name – a beastly act of sodomizing a 4 year old child as was confirmed by the witnesses who testified for the prosecution. The appellant has addressed us in his submissions as if we were dealing with an application for review, a jurisdiction which in law is donated to the High Court.

11. As we have no jurisdiction to deal with matters of fact there is no merit in this appeal which is accordingly dismissed.

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

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