Kingori v Republic (Criminal Appeal 91 of 2016)
[2022] KECA 1396 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KECA 1396 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 91 OF 2016

MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA

DECEMBER 16, 2022

BETWEEN

ROBERT NDIRANGU KINGORI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgement of the High Court of Kenya at Nyeri (Mativo, J,) dated 13th October, 2016 in HCCRA No. 52 of 2011)

JUDGMENT

1. This is a second appeal arising from the judgement of the High Court of Kenya at Nyeri (Mativo, J, as he then was) dated and delivered on October 13, 2016 upholding both conviction and sentence that had been meted by the Chief Magistrate's court at Nyeri.

2. The background of this appeal is that the appellant was charged in the Chief Magistrate's court in Criminal Case No. 36 of 2011 for the offence of defiling a child contrary to Section 8(1) (2) of the *Sexual Offences Act*. The particulars being that on 9th October, 2010 the appellant intentionally and unlawfully caused penetration of his penis into the vagina of DKK, a girl aged five (5) years and eight months. He was tried, convicted and sentenced to serve life imprisonment. Dissatisfied with the decision of the trial court, the appellant appealed to the High Court and the court affirmed his sentence and conviction. Aggrieved with the decision of the first appellate court he appealed to this Court.

3. There was no finding on an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offence Act.*

4. The appellant denied the charge leading to a trial where the prosecution called 5 witnesses to prove that, while the complainant (PW3) was playing outside with her friends, the appellant called her to his house and cooked her tea, eggs and groundnuts and after taking the same, he pulled her to the chair,

pulled her dress up, removed her pants and inserted his "thing" in her. That she felt pain. Thereafter, he wiped her; threatened to kill her if she told anyone.

5. It was not until October 15, 2010 when she was playing with other children at school that she told one NS, a pupil about the incident, and that she was usually defiled by the appellant. That the pupil then told JN, PW2 (complainant's teacher) who summoned PW3 and she confirmed what the pupil said. Afterwards, PW2 sent for DKK's mother PK (PW1) to come to school, and on arrival, PW1 was informed about the incident.

6. On the same day after a report had been made to Esther Kingori, a police officer (PW5), PW3 was taken to hospital for medical examination.

7. Dr. Alex Muturi, PW4 (medical officer) presented the P3 form which had been filled by Dr. Waweru on 27th October, 2010 whereby he had stated that the complainant complained of pain while passing urine and on examination of her genitalia, it was found that the hymen was broken, there was no blood or discharge and neither had a prior examination been done. PW4 also stated that the police omitted the medical examination of the appellant and so he did not have the appellant's P3 form.

8. PW5 testified that the appellant was arrested later in the day on October 15, 2010 and charged with the offence of defilement. She also adduced the health card of the complainant. As regards the omission of medical examination of the appellant, PW5 stated that it was their view that the same would serve no purpose as seven (7) days had already lapsed since the incident took place and the appellant had already showered.

9. On his part, the appellant alleged that he had been framed because of a grudge that he had with the complainant's mother regarding a radio which she had taken to the appellant for repair.

10. Aggrieved by the judgement of the lower court, the appellant filed an appeal at the High Court and raised four (4) grounds of appeal as follows:

    a. The learned trial Magistrate erred in law and fact in overlooking the fact that the case was a fabrication of PW1, PW2 and PW3 to settle a hidden grudge i.e the appellant's family and that of the complainant.

    b. The learned trial Magistrate erred in law and fact in convicting in disregard of the arresting officers and other relating persons (sic) who effected the appellant's arrest.

    c. The learned trial Magistrate erred in law and fact in convicting in disregard that there was no report made until the appellant's arrest.

    d. The learned trial Magistrate erred in law and fact in convicting without any medical test done on the appellant.

11. The learned Judge summarized the above grounds into two (2) namely: - whether the prosecution proved its case to the required standard and whether the trial court considered the appellant's defence. Upon review of the evidence adduced in the trial court and consideration of the submissions by the appellant and the respondent, the learned Judge held that the medical evidence confirmed that the hymen was broken hence there was penetration, and this was in consonance with the minor's testimony that the appellant removed her pant and inserted his "thing" in her private parts. The learned Judge found, that evidence was cogent and was not rebutted, thus, was sufficient to demonstrate that there was penetration which is an essential element in a sexual offence.

12. With regard the age of the complainant, the learned Judge held that it was clear from the health card produced in the lower court that the child was born on August 5, 2003 and was six (6) years at the time

of the offence was committed in October, 2010. In addition, the P3 form showed that the child was six (6) years. As such, he found that the age of the child was sufficiently proved.

13. Thirdly, with regard to the appellant's evidence, the learned Judge held that: the appellant did not rebut the prosecution evidence and neither did he address the key allegations; he did not deny calling the complainant to his house or serving her with tea, eggs and other items; there was nothing to show that the complaint arose from the mother to warrant the inference that she framed the charges as alleged; the mother learnt from the teacher and heard it for the first time from the child when she was summoned to her school seven (7) days after the incident took place; had the complaint emanated from the mother and bad motive disclosed, then the appellant's allegations could raise doubts but as it were, the said line of defence was not convincing and clearly showed that the same did not create/cast doubts on the serious allegations made in support of the charges against the appellant.

14. Consequently, the learned Judge held that the learned Magistrate properly analyzed the evidence and properly convicted the appellant and hence upheld the conviction.

15. As regards the sentence, the learned Judge noted the provisions of Section 8(2) of the *Sexual Offences Act* that a person guilty of an offence under that section is liable upon conviction to imprisonment for life, to hold that the sentence imposed was as provided under law and there was no legal basis to interfere with it.

16. The appellant being dissatisfied with the whole of said judgment filed this appeal raising five (5) grounds of appeal as follows: -

    a. The appellate Judge erred in law and fact while supporting the trial court findings that PW1, PW2 and PW3 proved their case beyond reasonable doubt without considering that their testimonies were relating to an offence which was never reported.

    b. The appellate Judge erred in law and fact when he relied on the evidence of PW4 (clinical officer) that he proved the act of penetration took place without considering that he was not the one who examined the victim thus Sections 77 and 34 B(2)(a) of the *Evidence Act* were violated.

    c. The appellate Judge lost direction in becoming influenced with the mode of the appellant's arrest without putting into consideration that he was arrested seven (7) days after alleged date of the offence while there is no adduced evidence that he had gone underground.

    d. The appellate Judge erred in law and fact in upholding the appellant's conviction without relying on his defence which was improperly rejected by the trial court without considering that the same was not displaced by the prosecution side as per Section 212 of the *CPC*.

    e. Since the appellant cannot recall all that transpired during the trial of his appeal, his kind request is that he be served with the court proceedings and that he be present during the hearing of this appeal.

17. The appeal was canvassed through written submissions of both the appellant and respondent which were orally highlighted.

18. In relation to grounds 1, 3 and 4 which relate to the evidence of PW1, PW2 and PW3, the circumstances of the appellant's arrest and his defence during trial, the appellant submits that the first appellate court did not deal with the contradictions and inconsistencies with respect to the complainant who was a minor, having the courage to allege that a grown up person like him (appellant) defiled her and yet, she was not admitted to any health facility. Further, that according to the proceedings, the complainant stated that she was in school when the incident was discovered and

thereafter the appellant was arrested. He argues that these discrepancies go to the root of this case, impeaches the complainant's credibility and perils the prosecution's case. That instead, the prosecution relied on the appellant's defence to fill the gaping holes in their case but the same did not hold any water and in any case, his statement of defence cannot be used to make the prosecution's case.

19. Supporting ground 2 which relates to the evidence on penetration, the appellant contends that no DNA test was carried out, and the absence of a hymen was not proof of defilement. The appellant further contends that the latter has been proved by scientific and medical evidence which has been found that some girls are not born with the hymen, while in others, the hymen may be broken by other factors other than sexual intercourse like insertion of a tampon, menstruation, injury and medical examination which can rapture the hymen. Thus, the prosecution did not avail evidence to prove defilement beyond reasonable doubt.

20. Lastly, the appellant submits that being a first offender a non-custodial sentence ought to have been considered on the grounds that he was the only bread winner to his poor family, and he will be a good citizen as he has demonstrated good behaviour whilst in prison.

21. In rebuttal of the appellant's appeal, the respondent/prosecution opposed the same on four (4) grounds namely: -

    a. Whether the case was reported and the appellant being arrested after seven (7) days.

    b. Whether the prosecution proved their case.

    c. The P3 form not produced by the maker.

    d. Whether the appellant's defence was considered.

22. The respondent submits that this being a second appeal, this Court is bound to consider only issues of law and not fact and further, that this Court should remain loyal to the concurrent findings of facts by the two lower courts in which regard it relied on the case of *Karingo vs Republic* [1982] KLR 213 wherein it was held that: -

> " A second appeal must be confined to matters of law and this court will not interfere with concurrent findings of facts arrived at in the two courts unless based on no evidence. The test to be applied here on second appeal is whether there was any evidence on which the trial court could find as it did."

Based on this premise, the respondent submits that the first and third grounds lacked merit and ought to be dismissed. That this aside, all evidence pointed to the appellant as stated by the complainant, given that nobody else other than the two of them were in the room when the incident took place, and which evidence was not disputed by the appellant. That in addition, the complainant's evidence was corroborated by PW1, PW2 and PW4.

23. Supporting its ground 2, the respondent argues that the prosecution proved its case with regard to the ingredients of the offence of defilement i.e age, penetration and identification of the perpetrator. The respondent contended that the age of the complainant was proved by the health card which showed that the complainant was born on August 5, 2003. Penetration was proved by PW4 and it was confirmed that the complainant's hymen was broken upon which the conclusion was made that she had been defiled and that the penetration was caused by the appellant. The identity of the appellant was known to complainant as "baba Mercy" as they were neighbours which meant that the complainant knew the appellant very well, hence, there could be no case of mistaken identity.

24. Supporting its ground 3 on the P3 form not being produced by the maker, the respondent submits that the record clearly shows that the person who tendered evidence the P3 form was not the maker of the document but that the same was produced and admitted in compliance with Section 77 of the *Evidence Act* which presumes that official government reports are presumed as genuine and the person signing it held the office and qualifications which he professed to hold at the time when he signed it. That further, the provision allows a person other than the one who prepared a report such as a P3 form to produce it provided that the presumption of authenticity is met and if the document is signed by the person who held the office and qualifications which he professed to hold at the time when he signed it. For this preposition, the respondent relied on the case of *Naomi Bonari Angasa vs. Republic* [2018] eKLR wherein it was held that: -

> " ....Section 77 of the *Evidence Act* allows a person other than the one who prepared a report such as the P3 form in issue to produce it provided the presumption of authenticity is met. Once the presumption of authenticity under Section 77(2) aforesaid is met, the documents is admissible but the trial court may "suo moto" or upon request by the accused person call the matter of such a document to appear in court for cross examination on the form and the contents of the report."

25. Supporting its ground 4 on whether the appellant's defence was considered, the respondent argues that the two lower courts considered the appellant's defence but found that it did not hold water against the evidence adduced by the prosecution as he was placed at the scene and positively identified by the complainant, hence, there was no need for the prosecution to call witnesses to rebut his defence.

26. The respondent urges us to find that the appellant's conviction was safe and this appeal did not raise any basis to disturb the same and as such, the conviction should be upheld and the sentence confirmed.

27. This is a second appeal. The mandate of this Court has been enunciated in a long line of cases decided by the court. See *Maina versus Mugiria* [1983] KLR 78, *Kenya Breweries Ltd vs. Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another vs. Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

28. See also the English case of *Martin vs. Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 which held inter alia that, 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 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.

29. We have carefully considered the record, judgments of both the trial and first appellate court and the rival submissions set out above in light of this Court's mandate. The issue with regard to the corroboration of the testimonies of PW1, PW2 and PW3 on an offence which according to the appellant was never reported, is an issue of fact which was considered by both the trial and appellate court.

30. In this regard, the record clearly shows that the incident was reported seven (7) days after it took place to PW2 by a pupil and it was then that PW2 summoned PW3 who confirmed what the pupil said in class and sent her to call her mother (PW1) to school. Thereafter, they reported the incident to the police and the complainant was taken to hospital. Soon after, the appellant was arrested. Secondly, this

issue also goes hand in hand with the issue of whether or not the prosecution proved its case beyond reasonable doubt; which is an issue of fact which was considered in both lower courts.

31. The issue with regard to proof of penetration and the P3 form not being adduced in court by the clinical officer who examined the complainant; the former is an issue of fact which was considered by both the trial and appellate courts while the latter is an issue of law. The appellant in his submissions also raised the fact that no DNA test was conducted. On this matter, the record shows that this fact was considered by the trial court whereby PW5 testified that the appellant could not be examined as seven (7) days had already lapsed from the date the incident took place and thus, no medical examination was needed to be carried out as he had already taken a shower. The appellate court on the other hand tied this issue on whether or not the prosecution proved its case to the required standard wherein it held to the affirmative.

32. The issue with regard to the mode of the appellant's arrest seven (7) days after the incident took place is an issue of fact which was considered by both the trial and appellate courts wherein the appellant was arrested by a mob after being positively identified by the complainant. The trial court considered both the issue of the appellant being arrested by a mob after being positively identified by the complainant while the appellate court considered the fact that the complainant positively identified the appellant as they were neighbours.

33. The issue with regard to the appellant's defence being considered is an issue of fact that was considered by both the trial and appellate courts wherein both courts held that the appellant never denied that he committed the offence and secondly, his defence did not rebut the evidence of the prosecution by addressing the key allegations claimed.

34. Given the above, the issues of law that call for this Court's determination in this this appeal are: -

    a. Whether or not the P3 form adduced before court, having not been produced by its maker, the medical officer who examined the complainant, is adverse to this case.

    b. Whether the conviction and sentence were merited in the circumstances.

35. On the first issue, we find that the same was not raised by the appellant during trial and as such, the appellant cannot now raise the same. But be that as it may, we agree with the respondent that the record shows that the person who adduced the P3 form was not the maker of the document, nonetheless, it was adduced in compliance with Section 77 of the *Evidence Act* which allows a person other than the one who prepared a report such as a P3 form to produce it, provided that the presumption of authenticity is met, and if the document is signed by the person who held the office and qualifications which he professed to hold at the time when he signed it.

36. Having evaluated the record of both the trial and first appellate courts, we find that the first appellate court considered the ingredients of the offence of defilement to the required legal standard. The two lower courts analyzed the evidence taking into consideration relevant facts, legal principles and the law. The upshot is that there is no merit in this appeal, and hereby dismiss it with the result that the conviction by the trial court and confirmed by the High Court is upheld. In addition, the sentence was merited and in accordance with the law.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR