NN v Republic (Criminal Appeal 40 of 2021)
[2022] KECA 1341 (KLR) (2 December 2022) (Judgment)

Neutral citation: [2022] KECA 1341 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 40 OF 2021

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

DECEMBER 2, 2022

BETWEEN

NN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court at Mombasa delivered by M. Thande, J. on 11th September 2020 in High Court Criminal Appeal No 10 of 2020 (Originally Mariakani SPM Criminal Case SO 7 of 2019))

JUDGMENT

1. This a second appeal that was lodged by the appellant, who is in person against the judgment dated 11th September 2020 by M. Thande, J. in High Court Criminal Appeal No 10 of 2020.

   The Appellant was charged before the Senior Principal Magistrates Court at Mariakani with one count of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*. He faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* (SOA). The particulars of the offence were that the appellant on 11th January 2019 in Kingango, Sub-County, Kwale County, the appellant intentionally caused his penis to penetrate the vagina of LN (the complainant), a child aged 5 years. The particulars of the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* were that, on 11th January 2019 in Kingango, Sub-County, Kwale County the appellant intentionally and unlawfully touched the vagina of the complainant with his penis.

2. The appellant pleaded not guilty. The prosecution called 5 witnesses while the appellant testified in his defence but called no witness. The prosecution case was that PW1, MP the older sister of the victim aged 10-year-old at the time was at home and witnessed the appellant, who is a step-brother defile her sister PW3, inside their father's house. She heard the appellant promise PW3 that he would give her

money to buy fried potatoes. PW2, MJO, the mother of PW1 and PW3 admitted leaving the victim with the appellant on 11th January 2019 and upon return she was informed by PW1 that the appellant defiled PW3. She took the child to Samburu Health Centre after confirming that she had injuries in her private parts. PW3, LO, the victim gave an unsworn statement. She recounted her ordeal with the appellant; saying that the appellant defiled her and promised to give her money to buy viazi (potatoes) at school.

3. The matter was reported to Cpl Paul Mutua (PW2) who recorded statements from PW3 to the effect that she returned home only to be told by PW1 that the appellant had defiled PW3. PW2 established that the child was born on 24th March 2013 as evidenced by the birth certificate produced as P.exh

   PW3 was taken to Samburu Health Centre where she was examined by Dr Rashid Omar Luvumbo who filled a P3 form. The examination of PW3 revealed that she had a swollen vulva, 2 bruises on both sides of the labia minora and an intact hymen. The conclusion was that there was partial penetration. The appellant was placed on his defence. In his defence he denied the charges.

4. The learned trial Magistrate, Hon. N.C. Adalo in her judgment, relying on the birth certificate adduced in evidence, found that the victim, PW3 was a minor aged 5 years as at the time offence was committed. She was satisfied that partial penetration was proved through medical evidence documented in the P3 form. The learned trial magistrate was satisfied with that the appellant was properly identified as the perpetrator, having been recognized by PW1 and PW3. The appellant was found guilty of the main count, convicted and sentenced to serve life imprisonment.

5. The appellant was dissatisfied with the decision of the learned magistrate and appealed to the High Court at Mombasa on the grounds [as amended] that the age of the victim was not proven; that he, the appellant was a minor when the alleged offence was committed and that the mandatory minimum sentence was unconstitutional. The learned Judge, M. Thande, J. in a judgment delivered on 11th September 2020 was not convinced that there was evidence to the effect that the appellant was a minor as at the time of commission of the offence. The court considered that the issue of the appellant's alleged minority age was not raised at the trial court. The court also found that the appellant did not mention how old he was at the time of the offence and therefore she dismissed that ground for being introduced for the first time on appeal, citing this Court's decision in *Japheth Mwambire Mbitha vs. Rep* 2019 eKLR where the Court held that no new grounds should be introduced at the appeal stage.

6. In regard to the birth certificate produced as proof of the age the victim, the learned Judge found that the same was a photocopy and so was adduced in contravention to Section 66 of the *Evidence Act*. The court however found that the available evidence being the testimony of PW2 and the P3 form filled and produced in evidence by the doctor PW5 all pointed to PW3's age as being 5 years. On the issue of mandatory minimum sentence, after considering the Muruatetu 2 case and the case of *Eliud Waweru Wambui vs. R* (2019) eKLR, it was noted that due to the tender age of the victim, being 5 years, the offence was aggravated and thus the appellant was undeserving of discretion as to lead to reduction of the sentence as he sought. The appeal was dismissed and both the conviction and sentence were upheld.

7. The appellant was dissatisfied with the decision and filed a second appeal to this Court. The initial grounds of this second appeal are that the prosecution case was marred with contradictions; that Section 163(1) (c) of the *Evidence Act* was not considered; that the age of the victim was not proven and that his defence was not considered.

8. On the 14th July 2022 the appellant filed what he termed as "Appellant's Ground of Mitigation". He then set out three grounds of appeal which are:

1. That the legal provision providing for a mandatory minimum of sentence under section 8(2) of the SOA conflicts and contradicts section 216 and 329 of the *Penal Code*

2. I beg this court to consider that I am first offender.

3. That I beg this court to take into consideration that I the appellant is remorseful.

9. The Principal Prosecution Counsel Ms. Keya Ombele filed submissions dated 13th July 2022. From the submissions, she responded to the appellant's initial grounds of appeal. Learned prosecution counsel, after setting down the summary of the case before the Magistrates Court, and the appeal before the first appellate court, the legal issues which arose before both courts reacted to the appellant's initial grounds as set out herein above.

10. This is a second appeal. We have considered the appeal and the written submissions. The role of the second appellate court is now well settled. The parameters within which we should exercise our mandate as a second appellate Court were succinctly set out in *Karani vs. R* [2010] 1 KLR 73 wherein 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."

11. The appellant relied on his filed "Appellant Written Mitigation." This was followed by itemized submissions under each head. In respect of ground 1, the appellant, quoting the Court of Appeal case of *Eliud Waweru Wambui vs. Rep* C.A. No. 102 of 2016 urged that the mandatory maximum sentence under the SOA denies judicial officers their legitimate jurisdiction to exercise discretion in sentencing based on the scope of the evidence adduced and recorded on case to case basis. He urged that the life imprisonment sentence prescribed under section 8(2) of SOA. On the second and third grounds he urged the Court to consider that he was a first offender, and that he was remorseful for the offence.

12. Ms. Keya for the State submitted that the elements of the offence of defilement were proved through evidence, and that it met the threshold of proof beyond reasonable doubt. In regard to penetration, learned Prosecution Counsel relied on the decision in *Samuel Mbeka Ayiera v. Republic* (2020) eKLR for the proposition that so long as there was penetration whether only on the surface or deeper inside the girl's organ.

    Counsel urged that the victim's age was proved through the birth certificate produced by PW4, establishing that she was born on 24th March 2013, therefore 5 years and 10 months at the time of the commission of the offence.

13. On identification counsel urged that PW1 and PW3 positively identified the appellant as their step-brother, and that their mother, PW2 also confirmed that she left the appellant with the children while she went out to run errands. On the sentence counsel urged that the courts below properly addressed their minds to the mandatory sentence prescribed for the offence, and the aggravated nature of the circumstances of the offence, and urged us not to interfere with their findings.

14. Ms. Keya urged this Court to dismiss the appeal for having raised only grounds of fact, based on the provision of section 361 (1) of the *Criminal Procedure Code* and the decision in *M'Riungu v. Republic* (1983) KLR 455 where it was stated thus;

> "Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached the same conclusion, which would be the same as holding the decision is bad in law."

15. We have considered the grounds raised by the appellant in this appeal. We have been urged to find that the victim's age was not proved and that the appellant was not properly identified. These are grounds of fact as they are dependent on evidence. On the victim's age, the learned Judge of the High Court went into great length to consider the evidence adduced in proof thereof and found that the evidence of the victim's mother, PW2, and of PW5, the doctor who examined her and ascertained her age proved that she was 5 years of age, as had the trial court. We find nothing on record to show that the trial court and the High Court either took into consideration factors which they ought not to have considered, or failed to consider relevant facts. There is no basis to differ with their concurrent finding of fact on this issue.

16. As to the identification of the appellant as the perpetrator of the offence, it was not contested that the appellant was a step brother of both the victim and PW1, the only other eye witness. The incident took place at the home of the appellant and PW1 and PW3's father's house in broad day light. There was no chance that there could have been mistaken identity. This was also not an issue that was raised at the trial. We are satisfied that the two courts below addressed their minds to the evidence adduced before them and were satisfied that the prosecution had proved that the appellant was the perpetrator of the offence.

17. The appellant cited section 163 (1) (c) of the *Evidence Act*. There was however no substantiation of the section and its relevance to his appeal. The section deals with credibility of witnesses, and the sub-section relied upon deals with impeachment of a witness through previous statements made by them. It provides:

> 163. Evidence to impeach the credit of a witness.
>
> 1. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him—
>
> (a) ...
>
> (b) ...
>
> (c) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted

18. No statements of any kind were produced in court for the purpose of establishing that any of the witnesses for the prosecution were not persons of credibility. The learned trial Magistrate made a specific finding, quoting section 124 of the *Evidence Act* that the victim was a truthful witness. We find that there is no basis of finding otherwise.

19. As for the three grounds raised in the supplementary grounds are actually mitigations on sentence. Severity of sentence is a question of fact and it is always at the discretion of the trial court. In this matter, the appellant does not contend the sentence meted was either illegal or unlawful. In *Wanjema - v- Republic* (1971) EA 493 this Court stated as follows regarding interference with sentencing:

> " [The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

20. In this matter, there is nothing on record to show that the trial court erred in the exercise of its discretion in meting out the life sentence for the offence as charged. There is nothing on record to show that the learned judge erred in upholding the sentence. As stated before, severity of sentence is a question of fact and in a second appeal our jurisdiction is confined to matters of law. In *M K M vs Republic* [2018] eKLR this Court faced with a similar "appeal" rendered itself thus: -

> " Indeed, we need to state quite categorically that the practice now seeming to gain traction and notoriety, of second appeals against severity of sentence only being presented as mitigation statements or the like, has no foundation in law, is contrary to statute and should stop. It is also worth recalling, that when all a person presents on a second appeal is a mitigation, there really is no appeal because an appeal under our Rules is based on a memorandum of appeal."

21. Having considered this appeal, we have come to the conclusion that the same is for dismissal. We find no merit in this appeal and we dismiss it in its entirety.

Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 2ND DAY OF DECEMBER, 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR