Muchangi v Republic (Criminal Appeal 9 of 2016) [2021] KECA 238 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 238 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 9 OF 2016

W KARANJA, PO KIAGE & J MOHAMMED, JJA

DECEMBER 3, 2021

BETWEEN

BENARD MUCHANGI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from conviction and sentence of the High Court of Kenya at Embu (F. Muchemi, J) dated 12th April, 2016 in H.C.CR.A. NO. 44 OF 2015)

JUDGMENT

1. This is a second appeal from the decision of the Senior Resident Magistrate Embu delivered on 18th May, 2015 whereby the appellant was convicted of attempted defilement and committing an indecent Act on the same child and sentenced to serve ten (10) years imprisonment. He was dissatisfied with the judgment and lodged an appeal before the High Court, which appeal was not successful hence the appeal to this Court.

2. The victim, JIK was a 9 year old child and was in class 3 as at the time the said defilement is said to have taken place. Her evidence was that on the material day she met the appellant in Embu town where she stayed with her family; that the appellant got hold of her and took her to his house in the same plot where her family resided; that he undressed her and also removed his trousers before lying on top of her; he then inserted something in her birth carnal causing her a lot of pain and which made her scream. She reported the incident to her mother when she returned home in the evening. It was her evidence that she knew the appellant before the incident and she was able to identify him to PW 4 who took the child to her mother and reported the incident. They then reported the matter to the area chief and later to the police station.

3. The child was taken to hospital where she was examined by Dr. Njuki who found the child with bruises on the middle aspect of both thighs and around the vagina opening. He opined that there was partial penetration.

4. The appellant in his defence denied having committed the offence and stated that he was arrested on 30th April, 2014 and taken to court on allegation of defiling his neighbour's child. He said that he was framed as they had differed with the child's mother who was his jilted lover. He also alleged that PW4 was his business competitor and that they had differed which led her to lie to the court.

5. Having considered the evidence presented before the court, the learned magistrate found the charge of defilement not proved as the medical evidence only revealed partial penetration. She nonetheless found the appellant guilty and convicted him on attempted defilement as well as the alternative charge of committing an indecent act on a child and sentenced him to 10 years imprisonment on both counts. There was no indication whether the sentences were to run concurrently or consecutively.

6. Before the High Court, the main grounds of the appeal were that no exhibits and medical report were produced in court to prove the prosecution's case; vital witnesses were not summoned to testify; and the magistrate dismissed the appellant's defence on weak reasons. The appeal was canvassed through written submission.

7. The appellant in his submissions stated that the magistrate failed to find that there was a grudge between him and the victims' mother and argued that Article 50 of the Constitution was violated as he was not allowed to cross examine the complainant.

8. The Court noted that the magistrate convicted the appellant for the offence of attempted defilement for the reason that penetration was partial yet Section 2 of the Act was clear on what was regarded as penetration. The court found that the prosecution had proved the offence of defilement and held that it was a misdirection on part of the trial magistrate to convict the appellant on a lesser offence.

9. The matter before the High Court took an interesting turn as the learned Judge found that as partial penetration had been proved, and partial penetration amounts to penetration, all the ingredients of the offence of defilement as opposed to attempted defilement had been proved, and suo motu set aside the conviction on attempted defilement and substituted it with one of defilement contrary to Section 8(1) of the *Sexual Offences Act*.

   The sentence of ten (10) years imprisonment was substituted thereof for one of life imprisonment under Section 8(2) of the Act.

10. In his appeal, the appellant relies on his homemade grounds in which he faults the learned Judge for failing to consider that the prosecution evidence tendered was insufficient to hold a conviction; failing to consider that no clothing was produced as a supporting exhibit; failing to consider that the appellant's rights under Article 49 were violated and failing to consider the appellant's defence.

11. The appellant has filed submissions which he said he would totally rely on when the matter came up for plenary hearing. He submits that he is not disputing the prosecution allegations that the complainant was defiled as stated, he only disputes his participation in commission of the crime; that the learned Judge in dismissing his appeal relied on the lower court's decision that the appellant had attempted to defile the child and the same time indecently touched the child on her genitalia using his penis contrary to Section 9(1) as read with 9(2) and Section 11(1).

12. His submissions majorly raise matters of fact which as a 2nd appellate court we must eschew.

13. The respondent has filed submissions which Mr. Ondimu, learned counsel for the State said he would wholly rely on without making any highlights. They submit that the appellant filed six (6) grounds of appeal which they summarized as follows; whether the 1st appellate court properly re-evaluated

the evidence; whether all material witnesses testified and whether the appellant's defence was considered.

14. The respondent submits that PW 1 having testified that she was nine (9) years old and in class three; PW 2 a doctor testified that the victim informed him that she was nine (9) years old and PW 3 the child's mother having produced as exhibit the birth notification showing that the child was born on 10th April, 2004 the appellant had not brought any new material facts to dispute the fact of age, and so the child's age was proved to be 9 years.

15. The respondent further submits that PW 1 (after voire dire was conducted) testified that the appellant had sex with her, PW 2 a Doctor at Embu Provincial Hospital testified that he examined the victim and signed on the P3 form on the 2nd May, 2014 and came to the conclusion that the victim had bruises on the middle aspects of both thighs and around the vaginal openings. He stated that there was no full penetration and tendered the P3 form as PEX 1, Post Rape Care Form as PEXB 2, lab results as PEXH 3. That from the foregoing the evidence produced during the trial clearly proved the element of penetration to the required standards.

16. On the identity of the perpetrator, the respondent submits that PW 1 testified that it was the appellant who defiled her and identified him in court, that it was clear that the appellant was well known to the victim as they lived in the same plot, the evidence of the victim was well corroborated by other witnesses and the medical evidence. That from the evidence adduced during the trial, it was clear that the appellant was the person who defiled the victim and there was no possibility of mistaken identity.

17. On whether the appellant's defense was considered, the respondent submits that the appellant gave unsworn defence; that the trial court did fully consider the appellant's defence which was a mere denial and had no basis; that the 1st appellate court duly considered the appellant's defence and thus the two courts cannot be faulted for reaching such a conclusion; that the evidence on record clearly showed that the appellant's defence was duly considered as required.

18. When prompted by the Court to comment on the substitution/enhancement of the sentence from 10 years to life imprisonment, learned counsel conceded that the sentence was improper as there was no notice of enhancement of sentence filed by the State; there was no evidence that the appellant had been warned of the possibility of facing a life sentence if he opted to proceed with the appeal, and that there was no cross-appeal by the State. He therefore conceded the appeal on sentence and asked the Court to consider reinstating the sentence meted out by the trial court.

19. We have carefully considered the totality of the evidence on record, the impugned judgment of the trial Court, the impugned judgment of the High Court and the grounds of appeal, the rival submissions by both parties and the law.

20. As already stated, this is a second appeal and the Court is by dint of Section 361(1) of the *Criminal Procedure Code* restricted to addressing itself to matters of law only. The Court will also not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or they are based on a misapprehension of the evidence, or that the courts below are shown

demonstrably to have acted on wrong principles in making the findings. This Court restated as much in *Karingo -vs- R (1982) KLR 213 at p. 219*;

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari C/O Karanja -vs- R* (1956) 17 EACA 146)."

21. Cognizant of the above principles and having read the record and in consideration of the rival arguments therein, the main issue falling for our determination is whether based on the evidence on record, the conviction against the appellant is sustainable.

22. The first appellate court after re-analyzing the evidence adduced before the trial court made similar findings as the trial court and pronounced itself as follows:-

> " PW 1's testimony was clear and graphic and left no doubt that it is the Appellant who had sexual relations with her. He was not a stranger and was well known to her...In this case the trial magistrate was satisfied that PW 1's testimony was clear and unshaken."
>
> Notwithstanding the provisions of section 124 of the Evidence Act, there is ample corroboration of PW 1's testimony... Leaves no doubt that there was penetration...

23. The court noted that the age of the minor was not in contest as it was established to be 9 years by her mother who produced the complainant's birth notification in court. The child's age was therefore proved as required by law.

24. The other issue is whether penetration was proved. There is no dispute that penetration was proved. The child's evidence coupled with that of her mother and neighbor and sealed by the doctor left no doubt that the child was defiled.

25. On whether the evidence proved that the appellant was the perpetrator of the offence, the appellant submitted that his was a case of mistaken identity. From the record, it can be seen that PW 1 testified that it was the appellant who defiled her and identified him to PW3 and also in court. Like found by the two courts below, the appellant was a neighbor to the child and was well known to her. We have no basis for departing from those concurrent findings of the two courts below.

26. In all, we are satisfied that the ingredients of defilement were proved as required under the *Sexual Offences Act* against the appellant as found by the first appellate court. However, as acknowledged and conceded by the learned State Counsel, there was no notice of enhancement of sentence filed, nor is there any evidence of a verbal warning addressed to the appellant informing him of possibility of enhancement of his sentence from 10 years to life imprisonment. There was no cross appeal filed by the State either. Needless to say, the appellant had no opportunity to say anything on the issue of the sentence before it was enhanced.

27. There was, therefore, in our view gross injustice committed against the appellant which injustice the law enjoins us to correct. In the circumstances, this appeal partially succeeds, with the result that the findings of the High Court as far as conviction only is concerned, are upheld. We nonetheless interfere with the life sentence and set it aside. We reinstate the sentence of 10 years imprisonment imposed by the trial court, which sentence should run from the date of conviction by the trial court. The appeal succeeds only to that extent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR