



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), MUSINGA & KIAGE, JJ.A.) CRIMINAL APPEAL NO. 190 OF 2016

BETWEEN

ISAAC GITHINJI MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Achode, J.) dated the 10th May, 2012 in H. C. Cr. A. No. 410 of 2010)

JUDGMENT OF THE COURT

1. This is a second appeal by Isaac Githinji Mwangi, (*the appellant*), against his conviction and sentence for the offence of defilement contrary to **section 8**

(1) and (2) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya. The particulars of the charge against the appellant were that on the 20th March, 2008 at Korogocho slums in Nairobi within Nairobi Area Province; he unlawfully and intentionally committed an act which caused the penetration of his male genital organ into the female genital organ of M N, a child of 10 years. It is on the basis of the above particulars and the evidence on record that the trial court convicted and sentenced the appellant to life imprisonment. Subsequently, the first appellate court confirmed the conviction and sentence.

2. The appeal now before us is premised on the grounds that the learned Judge erred in law by:-

“(a) Upholding the appellant’s conviction which was based on a defective charge sheet.

b. Confirming the appellant’s conviction on the basis of recognition evidence which was unsatisfactory..

c. Failing to appreciate that the manner in which the appellant was arrested was marred with contradictions..

d. Upholding that the complainant was a credible witness contrary to the evidence on record..

e. Failing to hold that there was no medical proof of penetration of the minor.

f. Failing to appreciate that the appellant wasn't afforded a fair hearing within reasonable time as contemplated under Section 77 (1) (2) (a) (b) and (c) of the former Constitution.

g. Rejecting the appellant's defence”.

3. A brief background will suffice to place the appeal in perspective. On the 20th March, 2008 at around 7:00 pm while MN (PW1) was on her way home, she met the appellant who she referred to as 'Mkorino'. After engaging her in a brief conversation, the appellant dragged MN into his house which was nearby. He ordered her to remove her underpants whilst he removed his trousers. He then applied oil on MN's genitalia and proceeded to defile her. When he was done he wiped her with water and a t-shirt. It was MN's evidence that the appellant was a neighbour and well known to her prior to the incident. On the same day MN confided in her mother, CM (PW4), who took her to the appellant's house but they did not find anyone. Thereafter, the appellant was arraigned and charged before the Chief Magistrate's Court at Makadara.

4. In his defence, the appellant gave an unsworn statement. He denied committing the offence he was charged with and maintained that he had been framed by C. He said that he was arrested on the 26th March, 2010 and taken to the Chief's camp. Later on, MN in the company of her mother and another lady came and identified him. He was then arraigned and charged in court.

5. At the hearing of the appeal, the appellant appeared in person and relied on his written submissions. He began by challenging the evidence of identification on the ground that there was no indication of the source or intensity of the light (if any) at the scene which facilitated his alleged recognition. Besides, no connection was established between the house which MN allegedly took her mother to, and himself. It was rather odd that C while making the initial report did not inform the police that the appellant was known to both the complainant and herself. Whereas C testified that it was MN who identified the appellant to the police, MN maintained that she did not know who identified the appellant to the police.

6. As far as the appellant was concerned, MN was not a credible witness for the simple reason that her evidence was full of contradictions. Giving instances of these inconsistencies, he submitted that on one hand, MN stated that the appellant told her to put on her underpants after the ordeal, on the other hand, C testified that she returned home without underpants. Although she stated that she was taken to the hospital the next day, on the 21st March, 2008, Dr. Ketra Muhombe (PW2) avowed that she examined her on the 22nd March, 2008. In addition, Dr. Zephaniah Kamau (PW3) who examined her after 2 weeks and filled in the P3 form observed that she had no injuries in the vulva or vagina, clearly indicating that there was no penetration. As a result, the charge sheet was defective on that ground.

7. The Senior Assistant Director of Public Prosecutions, Mrs. Murungi, in opposing the appeal, contended that the proviso to **section 124** of the **Evidence Act**, allows a trial court to convict on the sole evidence of a victim of a sexual offence. In that regard, MN had positively recognized the appellant as the perpetrator. On the issue of penetration, she urged that the medical evidence was clear that there was extreme redness on MN's genitalia, bleeding on the surface and her hymen had widened. Penetration is defined under **section 2** of the **Sexual Offences Act** to also include partial penetration which was the case herein. In the end, the prosecution had proved its case against the appellant.

8. We have duly perused the record of appeal. We have also considered the respective submissions of the appellant and learned counsel as well as the authorities cited.

9. This being a second appeal, our mandate is provided under **section 361** of the **Criminal Procedure Code**, as follows:

"361 (1)A party to an appeal from a subordinate court may, subject to sub-section (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:-

a. on a matter of fact, and severity of sentence is a matter of fact; or

b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence".

10. This Court has also pronounced itself on the aforesaid provision in a host of cases including **Hamisi Mbela & Another vs. R** - [Mombasa Court of

Appeal Criminal Appeal No. 319 of 2009] (UR), in which the Court expressed itself as follows:

"This being a second appeal, this Court is mandated under section 361 (1) of the Criminal Procedure Code to consider only issues of law. As was held in M'Riungu vs Republic [1983] KLR 445, 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 courts and resist the temptation to treat findings of fact as holdings of law or mixed findings 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 that conclusion, which would be the same as holding that the decision is bad in law. (Martin vs Glyneed Distributors Ltd. t/a MBS Fastenings)".

11. We understand the appellant's argument regarding the charge sheet to be that it was defective as drawn because there was no proof of penetration. **Section 8** of the **Sexual Offences Act** defines the offence of defilement in the following manner:-

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

12. It follows that penetration is an essential ingredient and ought to be established in respect of any charge of defilement. As rightly pointed out by Mrs. Murungi, **section 2** of the **Sexual Offences Act** defines penetration to include partial penetration. From the evidence of Dr. Ketra it is clear that there was partial penetration of the minor manifest by the widening of her hymen. Consequently, penetration was established and that ground falls flat on its face.

13. As to the identity of the perpetrator, the only available evidence was that of MN. This Court in the case of **Wamunga vs. R** [1989] KLR 424 whilst discussing the degree of caution to be taken where the only evidence against an accused is of identification succinctly stated:

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction".

On the issue of identification the trial court rendered itself thus:

"It is the evidence of the complainant MN that she met the accused person as she was going home. That she knew the accused person very well as Mukorino. The court noted that the accused had a scarf on his head. I have also noted that the scarf in his head is usually worn by members of the Akorino sect".

14. The foregoing observations by the trial court coupled with the uncontroverted evidence of MN to the effect that she was in close proximity to the appellant for a considerable time satisfies us like the two courts below that she was able to recognize the appellant, who was known to her. Further, her evidence was corroborated by her mother who testified that MN told her that it was the appellant who had defiled her and even took her to his house. In **Shalen Shakimba Ole Betui & Another vs. R** [2009] eKLR this Court held that:

“The present case was a case of recognition rather than identification and on our part we have considered this issue and are satisfied that in view of the concurrent findings of the two courts below the appellants were positively identified and recognized by PW1 and PW2. There could be no possibility of a mistaken identity. We are satisfied that the appellants were convicted on very sound evidence of recognition in circumstances which were conducive to proper identification/recognition, see Anjononi and Another vs. R. [1980] KLR 54 at p. 60.”

We therefore find and hold that the prevailing circumstances were such that they enabled the positive identification, indeed recognition of the appellant as the perpetrator.

15. Did the inconsistencies and/or contradictions alluded to by the appellant affect the weight of the prosecution’s evidence. In Philip Nzaka Watu vs. R [2016] eKLR, this Court articulated thus:-

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

16. Firstly, as to when MN was examined by Dr. Ketra, the evidence is clear that she was examined on 22nd March, 2008 thus the inconsistency in her evidence that she examined her on 21st March, 2008 is minor and immaterial and curable under **section 382** of the **Criminal Procedure Code** because it does not go to the root of the appellant’s conviction. Similarly, whether the appellant had defiled MN on more than one occasion was neither an issue before the trial court nor did it go to the root of the appellant’s conviction. It is not in dispute that the charge against the appellant was in respect of the defilement which occurred on 20th March, 2008. Our position is guided by this Court’s observation in Joseph Maina Mwangi vs. R - Criminal Appeal No. 73 of 1993 (ur) that:

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”

17. Secondly, we cannot help but note that there were contradictions on the manner in which the appellant was arrested but which were not addressed by the two courts below.

18. In the case of Erick Onyango Ondeng’ vs. R [2014] eKLR, this Court held as follows:

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See OKENO VS REPUBLIC (1972) EA 32).”

Emphasis added.

19. Be that as it may, we are convinced that the contradictions by the prosecution witnesses on the manner of the appellant’s arrest did not negate the fact that he was positively recognized as the person who had defiled MN. In our view, the contradictions do not point to a deliberate attempt by any of the

witnesses to lie to the court. In the case of *Twehangane Alfred vs. Uganda, Crim. App. No 139 of 2001, [2003] Ugca, 6*, the Uganda Court of Appeal stated that it is not every contradiction that necessitates rejection of evidence.

As the court put it:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

20. Moreover, we find no reason for interfering with the trial court’s finding that MN was a credible witness because it had the advantage of observing her demeanor. See *Martin Nyongesa Wanyonyi vs. R [2015] eKLR*.

21. Last but not least, with regard to whether the appellant was accorded a fair hearing in accordance with the former *Constitution*, we note that he did not submit on this ground. Nevertheless, we are satisfied from the record that he was afforded a fair trial within a reasonable time in line with *section 77 (1) (2) (a) (b) & (c)* of the former *Constitution* which provided -

“77

1. If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

2. Every person who is charged with a criminal offence –

a. shall be presumed to be innocent until he is proved or has pleaded guilty;

b. shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;

c. shall be given adequate time and facilities for the preparation of his defence;

22. We have said enough to demonstrate that the appeal lacks merit and is hereby dismissed. We so order.

Dated and delivered at Nairobi this 8th day of December, 2017.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR