Hamisi v Republic (Criminal Appeal E038 of 2023)
[2024] KEHC 543 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 543 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E038 OF 2023

A. ONG'INJO, J

JANUARY 25, 2024

BETWEEN

BISHARA HAMISI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of Hon. Rabera (PM) delivered on 7th March 2023 in Mombasa S. O. Case No. 87 of 2019, Republic v Bishara Hamisi)

JUDGMENT

Background

1. The Appellant Bishara Hamisiwas charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

2. Particulars were that Bishara Hamision the 15th day of September 2019 at Mtongwe Area in Likoni Sub-County within Mombasa County unlawfully and intentionally caused his penis to penetrate the vagina of SA, a child aged 9 years.

3. The appellant was convicted and sentenced to serve life imprisonment.

4. The appellant was aggrieved by the decision of the trial court and he preferred the appeal herein on the following grounds of appeal: -

    1. That the learned trial magistrate erred both in law and in fact when he failed to promptly inform the appellant of his fundamental right to choose and be represented by an advocate and to have an advocate assigned to him by the state at the state expense since the nature of the charges against him were such that substantial injustice would otherwise result if not represented by an advocate.

2. That the learned trial magistrate erred both in law and in fact in convicting the appellant on the evidence of the victim/complainant alone without corroboration which left her testimony unbelievable considering that the complainant gave unsworn evidence and considering the appellant's defence.

3. That the learned trial magistrate erred both in law and in fact in convicting the appellant without calling the alleged eye witnesses who never testified.

4. In the alternative to ground 3 above, the learned trial magistrate erred both in law and in fact in failing to find that the failure by the prosecution to call the alleged eye witnesses to testify in court gave rise to the doctrine of adverse inference rendering the charges against the appellant not sufficiently proved.

5. That the learned trial magistrate misapprehended the law in failing to find that according to the medical report the injuries observed by the doctor were old and not fresh indicating the alleged offence was committed on the alleged date and by the appellant.

6. That the learned trial magistrate erred both in law and in fact in failing to find that the complainant having reported the alleged offence on the same day it was committed and the appellant having been arrested at the scene of the alleged offence, it was mandatory that the appellant be taken to the hospital for DNA tests to prove beyond doubt that indeed he was the one who defiled the complainant.

7. That the learned trial magistrate misapplied the law in failing to believe the appellant's defence without any cogent reasons.

8. That the learned trial magistrate misapprehended and or misapplied the law in failing to properly analyse the evidence on record thereby reading wrong conclusions of facts and law.

9. That the learned trial magistrate erred both in law in sentencing the appellant to serve life imprisonment without stating the exact period as is required by law.

5. This appeal herein was canvassed by way of written submissions. The appellant filed submissions dated 16.10.2023 on 6.11.2023. The Respondent did not file any submissions or grounds of opposition.

Appellant's Submissions

6. On the first ground, the appellant submitted that he was not represented by an advocate on 17th September 2019 despite the plea court cautioning him of the severity of the sentence upon conviction. That the hearing commenced on 21st November 2019 when PW1 and PW2 who are crucial witnesses testified, and on 11th January 2021 when PW3 testified and the appellant was still unrepresented. The appellant relied on Article 50 (2) (g) and (h) of the *Constitution* on the right to fair trial for every accused person which included the right to be represented by an advocate. The appellant also relied on the decision by Mrima, J. in High Court (Migori) Criminal Appeal No. 33 of 2019, *Chacha Mwita v Republic* where it was held that the appellant was not accorded a fair trial and made an order for a retrial.

7. On the 2nd ground, the appellant quoted Section 124 of the *Evidence Act* which provides that corroboration is required in criminal cases. The appellant argues that PW1, Lilian Anyango is not an eye witness, that she does not even state that the complainant had told her what happened, and that her evidence does not disclose an offence, That PW3, Vincent Odhiambo Odongo, the father of the complainant did not witness the offence and that he was not told by the complainant what happened. That the lady who alerted him about the complainant being defiled and Mwinyi who rescued the complainant were never called to testify. The appellant submitted that the record does not show that

the Investigating Officer testified, that no investigations were done and no evidence of investigations were given to court. The appellant relied on the decision in High Court Criminal Appeal No. 8 of 2020, *PMG v Republic* by Onyiego, J. and the case of *Mercy Chelangat v Republic*, HCCRA No. E002 of 2021 when it set aside a conviction based on the evidence of a single witness.

8. On ground three and four, the appellant cited Section 150 of the Criminal Procedure Code on the power of the court to summon witnesses or examine the person present. That Korir, J. in High Court Criminal Revision No. 4 of 2018, *Clement Maskati Mvuko v Republic* explained the importance of Section 150 of the *Criminal Procedure Code* and its applicability. That the Court of Appeal appeared to have placed a duty and or a right on a victim to move the court to exercise its duty under Section 150 of the *Criminal Procedure Code* in Criminal Appeal No. 132 of 2016, *Joseph Lendrix Waswa v Republic*.

9. The appellant submitted on ground five that the P3 Form produced as Exhibit 1 shows that it was filled on 16th September 2019 when the complainant was examined and that there were no tears or blood stain on clothing. That the scar was old and did not support the fact that the injuries were inflicted 12 hours earlier, and which raises doubt as to whether the alleged defilement indeed took place on the alleged date of 15th September 2019.

10. On ground six, the appellant cited Section 36 of the *Sexual Offences Act* which provides for evidence of medical or forensic nature. That this section becomes mandatory where the evidence is insufficient to sustain a charge of defilement. That it becomes more so when the evidence available is that of only one witness. That in order to remove any doubt, the prosecution ought to have tendered evidence procured under Section 36 of the *Sexual Offences Act* and that having failed to do so then the charge failed. The appellant stated that the Court of Appeal explained the purpose of Section 36 of the *Sexual Offences Act* in Civil Appeal No. 56 of 2016, *COI & Another v Chief Magistrate Ukunda Law Court* which also appeared to have been decided in High Court Criminal Appeal No. 104 of 2015, *Jonah Isindu Limiti v Republic*.

11. On ground seven and eight, the appellant stated that the only reason the trial court gave in not believing the appellant's defence was that he did not raise it during cross examination of PW1 and it was therefore an afterthought. That this is not sufficient reason to reject the defence and that it should be noted that the appellant was not represented and he could not be blamed for not raising the issue during cross examination. That the defence should have been considered in light of the entire evidence before court.

12. On ground nine, the appellant argued that the proceedings do not show what the sentence is. However, the verbal instructions given was that the appellant was sentenced to life imprisonment in line with the decision of the Supreme Court in Petition No. 15 and 16 of 2015, *Francis Karioko Muruatetu and Another v Republic* that there is need to give a specific period in what constitutes life imprisonment. That the life sentence was harsh under the circumstances and should be reviewed in accordance with Petition No. E017 of 2021, *Philip Mueke Maingi & 5 Others v DPP & AG*.

Analysis and Determination

13. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same

conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

14. After considering the grounds of appeal, records of the trial court and submissions, the main issue for determination was whether the trial magistrate promptly informed the appellant of his right to choose and be represented by an advocate and to have an advocate assigned to him.

15. A perusal of the trial court records shows that when the appellant was arraigned in court to take plea, he was cautioned on the severity of the sentence he was charged upon conviction and he pleaded not guilty and the matter proceeded to hearing. He was not informed of the right to legal representation and the first 3 witnesses testified when the appellant was unrepresented and he had the opportunity to cross examine the said witnesses.

16. On 29th September 2021, the appellant applied to recall the complainant and PW3 for further cross examination and he did cross examine them on 14th April 2022. On 17th August 2022, Mr. Mwinyi Advocate came on record for the appellant and requested to recall all the prosecution witnesses but the application was not allowed for reason that those witnesses had already been recalled by the appellant and cross examined. The defence counsel only cross examined PW6, the Clinical Officer, and the prosecution's case was closed and the appellant placed on defence.

17. The trial magistrate having failed to inform the appellant of his fundamental right to choose an advocate to represent him, when the advocate came on record for the appellant, the least that the magistrate ought to have done was to recall the witnesses so as to accord the appellant a fair trial. Having declined to do so, the trial herein was rendered a nullity and as such, weighing the rights of the appellant against the rights of the complainant, this matter is referred back to the Chief Magistrate's court for retrial to enable the appellant's advocate properly represent the appellant of the prosecution to call witnesses including Mwinyi who did not testify. The appellant to be arraigned before the Chief Magistrate on 26th January 2024. Production order to issue.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 25TH DAY OF JANUARY 2024

HON. LADY JUSTICE A. ONG'INJO

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Mr. Hamisi H/B for Mr. Aboubakar Advocate for the Appellant

Appellant present in person