Abdalla v Republic (Criminal Appeal 44 of 2018)
[2022] KECA 1054 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KECA 1054 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 44 OF 2018

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

OCTOBER 7, 2022

BETWEEN

JUMA ABDALLA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court at Malindi delivered by Hon. Njoki Mwangi, J dated 18ath April 2018)

JUDGMENT

1. The appellant had been charged before the Kilifi Senior Principal Magistrate's court with count of defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual Offences Act* (hereafter *Sexual Offences Act*) and in the alternative with one count of committing an indecent act with a child contrary to section II (1) of the *Sexual Offences Act*. The appellant faced a second count to which he pleaded guilty.

2. The facts of the case were that PW1, the child's mother was on March 1, 2015 told that the victim was being washed by the appellant and she was naked. She rushed home to find the victim naked, crying and unable to stand and the appellant was at the scene hanging clothes. PW1 told court that the victim recounted to her how the appellant called her and put her on the bed then undressed her and put his fingers in her vagina and then penetrated his penis into her vagina. PW1 testified before the court that the victim told her that this was the third time and that the appellant threatened to kill her if she reported. The Victim, PW2 was 6 years' old and was born on April 3, 2009 as per her birth certificate Pexh1. She gave an unsworn statement after a voir dire examination was conducted on her. PW3 and PW4 narrated to court how on 1st March, 2015, they saw PW2 inside the appellant's house and both of them were naked; that PW2 was trembling and she kept crying. PW2 was examined on March 12, 2015 by Dr Shuchira whose report was produced by PW5. In the reports, a P3 form and PRC form, it was noted that she had a broken hymen; she had blood and pus in her genitalia.

3. The matter was reported to Kilifi Police Station where PW6 took over the case from a previous officer who was transferred. He noted that statements had been recorded and so he arrested the appellant. The appellant was placed on his defence. In his unsworn defence he told court that he was arrested on 6th April, 2015 and charged with defilement, which offence he denied. In his defence the appellant told court that there was a dispute between him and PW1 because he refused to sell her a plot that his son had purchased. He denied the charges levelled against him.

4. The learned Hon D.W. Nyambu vide judgment delivered on 23rd June, 2016 was satisfied with the evidence that the victim was of tender years; that sexual activity took place between the victim and the respondent because there was medical evidence of penetration and as corroborated by the state of the victim as reported by PW1, PW3 and PW4. She also was satisfied that the appellant was identified as the perpetrator being that he was at the scene of the offence and was known by PW1, PW2 and PW4. She found the appellant to be untruthful and dismissed his defence. The appellant was convicted in respect of the first count; no findings was entered on the alternative charge. He was sentenced to serve life imprisonment.

5. The appellant was aggrieved by the conviction and sentence and so preferred an appeal before the High Court. He challenged the judgment of the trial court for failing to consider that the plea taking procedure was defective for lack of an interpreter thus rendering the trial a nullity, for failing to consider that there was non-disclosure of the evidentiary material the prosecution intended to rely upon at the trial in breach of Article 50(2)(J) & (k) of the *Constitution*, by admitting into evidence the report of PW5 who was not the maker of the report, in breach of section 72 of the *Evidence Act*, and by failing to consider that the sentence was harsh and excessive in all the circumstances.

6. The learned judge of the High Court identified four issues for determination being whether the appellant was accorded a fair trial, whether the sentence imposed could be varied, whether penetration was proved and finally if the age of the victim was established.

7. In regard to the first issue, the learned judge found that the plea was properly taken and that there was interpretation into the Kiswahili language which the appellant understood, and to which he responded. The judge found that the appellant's argument that there was no interpreter in court did not arise.

8. On the second issue the learned judge found that the learned trial magistrate issued an order to the prosecution to supply the appellant with witness statements, and that several mentions were held before the hearing of the case finally commenced and that at no time did the appellant indicate that he had not been supplied with the witness statements.

9. In regard to the production of the P3 and PRC forms, the learned judge found that PW5 produced both exhibits pursuant to Section 77 of the *Evidence Act*, which the judge found entitled the trial court to presume that he documents were genuine, and that it was not mandatory to have the documents produced by the makers.

10. On the last issue regarding sentence, the learned judge found that the operative words under Section 8(2) of the Sexual Offence Act are 'shall upon conviction be sentenced to imprisonment for life', which did not confer on the trial court any discretion.

11. The High court upheld the conviction and confirmed the sentence imposed, dismissing the appellant's appeal. The appellant was aggrieved by the judgment of the High Court and therefore preferred this appeal.

12. The appeal was called out for virtual hearing on May 31, 2022. The appellant appeared in person, while Mr. Kirui learned Prosecution Counsel represented the State in this appeal. The appellant relied entirely on his filed written submissions which at the time of hearing had not been filed by the prison where he was held. Mr. Kirui on his part made oral submissions when he realised that the submissions filed by Mr. Monda were in respect of the appeal before the High Court.

13. In the appellants filed submissions filed on the June 2, 2022, he raised amended grounds of appeal, to wit that the charge of defilement was not proved as required and that only relatives of the complainant testified; that section 36 (1) of the SOA was not complied with and that the evidence adduced did not connect him to the defilement as the complainant was not subjected to any scientific testing; that the prosecution evidence was full of discrepancies, variation and irregularities, none of which were elaborated; that the production of documents was unprocedural under section 72 of the *Evidence Act*; that the appellant's defence was not considered; and that the appellant's rights were violated for reason the State filed their submissions before the appellant before the High Court on account of which the High Court found that the two parties were working at cross purposes.

14. The Mr. Kirui opposed the appeal and urged that the elements required to be proved were the age of the victim, that there was penetration and that the appellant was properly identified. Counsel urged that these elements were proved by the evidence of the PW1, PW2 and PW4, all who placed the appellant at the scene of the incident. That when PW3 the village elder who was the first to arrive the scene found the appellant cleaning his penis. Counsel urged that the reasonable conclusion to draw in such circumstances was that defilement had taken place. Counsel urged that from the evidence of PW1 to PW4 penetration was proved, and urged us to uphold the conviction. On the sentence counsel urged us to alter it and give a determinate sentence. He did not substantiate.

15. We are constrained, on a second appeal such as this, to consider matters of law only by dint of Section 361(1) of the *Criminal Procedure Code*. The role of the second appellate court was 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."

16. In that regard, it is established that "this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence." See *Karingo vs. Republic* (1982) KLR 213.

17. The appellant faced a charge of defilement of a child of 6 years contrary to section 8 (1) and 8 (2) of the SOA. The trial court and the superior court identified the elements of the offence charged that needed to be proved by the prosecution, which included the age of the victim, penetration and evidence that identified the appellant as the perpetrator of the attack on the victim.

18. The appellant now raises that the charge of defilement was not proved as required and that only relatives of the complainant testified; that section 36 (1) of the SOA was not complied with, that there was no nexus connecting him to the defilement as the complainant was not subjected to any scientific testing; that the prosecution evidence was full of discrepancies, and production of documents was unprocedural under section 72 of the *Evidence Act*; that the appellant's defence was not considered.

19. The learned trial magistrate addressed each of these issues and found, as stated earlier that she was satisfied that the evidence adduced established that the victim was of tender years; that sexual activity took place between the victim and the respondent because there was medical evidence of penetration and as corroborated by the state of the victim as reported by PW1, PW3 and PW4. She also was satisfied that the appellant was identified as the perpetrator being that he was at the scene of the offence and was known by PW1, PW2 and PW4. She considered the appellant's defence and found him to be untruthful and dismissed his defence.

20. The superior court on its part, in answer to the issue of production of documents and to the production of the P3 and PRC forms, the learned judge found that PW5 produced both exhibits pursuant to Section 77 of the *Evidence Act*, which the judge found entitled the trial court to presume that he documents were genuine, and that it was not mandatory to have the documents produced by the makers.

21. On the issue regarding sentence, the learned judge found that the operative words under Section 8(2) of the Sexual Offence Act are 'shall upon conviction be sentenced to imprisonment for life', which did not confer on the trial court any discretion. The High court upheld the conviction and confirmed the sentence imposed, dismissing the appellant's appeal.

22. We are satisfied that the two courts below subjected the evidence adduced before the trial court to a thorough analysis and arrived at the correct finding. We agree with the two courts' finding of fact that indeed the evidence against the appellant was strong and credible. There was overwhelming evidence to firmly establish the charge against the appellant and prove beyond any reasonable doubt that he committed the act of defilement against the victim. The appellant was caught washing his manhood while the complainant stood nearby trembling and crying.

23. The argument that a DNA test, under Section 36 of the Sexual Offence Act, was required to prove that there was penetration is not well founded. As this Court stated in *Robert Mutungi Mumbi vs. Republic* [2015] eKLR, Section 36(1) of the Sexual Offences Act empowers the court to direct a person charged with an offence under the Act to provide samples, including DNA testing to establish the linkage between the accused person and the offence. That provision is not couched in mandatory terms and DNA evidence is not the only evidence by which commission of a sexual offence may be proved. See also *Hadson Ali Mwachongo vs. Republic* [2016] eKLR

24. As regards sentence, the Supreme Court of Kenya in its Directions in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR has since pronounced that its earlier decision in the same case "did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute" and that its previous decision "cannot be authority for stating that all provisions of law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*.". We are satisfied that it was a legal sentence and was in line with section 8 (2) of the SOA. We have no basis therefore for interfering with the sentence passed by the trial court and affirmed by the High Court

25. We find no basis for departing from the concurrent findings of the courts below and conclusions reached. The result of this appeal is that the same has no merit and is dismissed in its entirety.

DATED AND DELIVERED AT MOMBASATHIS 7TH DAY OF OCTOBER, 2022

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISRAR