Amunze v Republic (Criminal Appeal 147 of 2016)
[2022] KECA 1074 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KECA 1074 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 147 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

OCTOBER 7, 2022

BETWEEN

ANTHONY AMUNZE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega (Mrima, J.) dated 21st July, 2016 in HCCRA No. 203 of 2013)

JUDGMENT

1. The appellant was charged with defilement of a child contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence are that on the 10th day of April 2012 at [Particulars Withheld] village, Shibuli Location, Central Butsotso Location in Kakamega Central District, within Western province, he intentionally and unlawfully caused his genital organ namely, penis to penetrate the genital organ, namely vagina, of "JN" a girl aged 11 years.

2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* at the same time and place.

3. The appellant denied the charges leading to a trial in which the prosecution called 7 witnesses in support of its case. The brief facts of the case, which both courts below agreed with are that, on April 10, 2012, the complainant, PW1, was going home from school when she met the appellant, a neighbour. She stretched out her hand to greet him but the appellant held her and took her to an unoccupied house where he defiled her. PW1 rushed home and reported the incident to her parents. PW4 and PW5, the complainant's parents, testified that the complainant had gone home on the material day crying, claiming that the appellant had defiled her. PW5, the complainant's mother, produced the complainant's birth certificate which revealed her date of birth as being June 9, 2001. She further indicated that upon observation of the complainant, she noted that she had scratch marks on

her neck, and her uniform tunic and underpants were spotted with blood. PW5 reported the incident at Eshisiru police station and took the minor to Kakamega Provincial Hospital where she was admitted for 2 days.

4. PW6, a clinical officer at the hospital testified that the complainant was admitted on April 10, 2012, and upon examination she was found to have a torn hymen with severe bleeding. She also had a tear on the posterior aspect of labia minora and there was heavy vaginal bleeding. Further, a high vaginal swab found red blood cells with some spermatozoa. PW6 produced as exhibits the P3 form which he had filled using details from the post rape form, a form used to examine the complainant, and the discharge summary. When placed on his defence, the appellant gave sworn evidence and called one witness. The appellant denied the charges, claiming that even though he knew the complainant, there was a possibility that he had been confused with another person with whom he shared the name Tony, and who also lived in the same area.

5. The trial magistrate (M.I.G Moranga, PM), having heard the testimonies of the witnesses, evaluated the evidence tendered before the court and found the appellant guilty as charged and sentenced him to imprisonment for life.

6. Aggrieved by the conviction and sentence, the appellant appealed to the High Court which, by a judgment delivered by Mrima, J. on July 21, 2016, dismissed the appeal in its entirety, upheld the conviction of the appellant and the sentence meted on him by the trial court.

7. Still aggrieved, the appellant preferred the instant appeal complaining that both the trial and first appellate courts erred by;

    a) Misevaluating the evidence adduced and demonstrating absolute bias in their conclusions.

    b) Failing to observe that the prosecution omitted crucial witnesses in support of their case.

    c) Failing to observe that the prosecution case was poorly investigated and shrouded with a lot of contradictions.

    d) Failing to consider that the prosecution did not disclose the evidence they intended to use against him before trial.

8. During the hearing of the appeal, learned Counsel Mr. Ochieng appeared for the appellant while the respondent was represented by Mr Ogutu, the learned Prosecution Counsel.

9. Mr. Ochieng submitted that guided by section 361 of the Criminal Procedure Code that speaks of the second appellate court dealing with matters of law only, he was going to highlight ground 4 only to the effect that Article 50(2) (c) and (j) of the *Constitution* were breached at the trial court. Counsel contended that the appellant was not given adequate time to prepare for the trial, having been issued with the prosecution statements at 12.18pm, and the hearing commencing at 2pm. To compound the situation, counsel argued, the statements were written in English, whereas the appellant only understood the Kiswahili language, and had indicated so. Mr. Ochieng submitted that the appellant was prejudiced further by the fact that the birth certificate of the complainant was adduced late in the hearing by PW5 as opposed to earlier on when he would have had the opportunity to cross-examine witnesses on the same.

10. At that juncture the Court sought to know whether the foregoing claims had been raised by the appellant at the High Court during the first appeal, to which counsel responded that they had not, but that nonetheless given that the issues raised were matters of law which touched on fundamental breaches, this Court could still take them up. In the end counsel urged us to allow the appeal without a retrial.

11. Prior to Mr. Ochieng coming on record, the appellant had filed written submissions in person raising a number of issues. He claimed that the charge sheet was defective for failing to disclose his nationality and residence. The appellant further argued that the trial court contravened section 137F(vi) of the *Criminal Procedure Code* when it failed to appoint a legal representative for him, in view of the fact that the offence he was charged with carried a mandatory life sentence. Moreover, it was argued that the trial court shifted the burden of proof on to the appellant, and that the prosecution had failed to prove its case beyond reasonable doubt.

12. Mr. Ogutu for the respondent opposed the appeal asserting that, during trial the appellant never objected to the production of the complainant's birth certificate by PW5, her mother, who in any case was the custodian of the birth certificate and therefore the right person to produce it. On the ground that the courts below misevaluated the evidence and were biased in their conclusions, counsel submitted that all the ingredients of the offence of defilement were proved satisfactorily. The birth certificate indicated that the complainant was born on June 9, 2001, establishing her age. The learned Judge upon perusing the P3 form, the Post Rape Care Form and the discharge summary found that indeed there was penetration. Further, the complainant properly recognised the appellant who was a neighbour, as the perpetrator, and provided this information at the earliest.

13. On the argument that the respondent failed to call crucial witnesses, Mr. Ogutu submitted that the issue was already addressed by the 1st appellate court which found that failure to avail school children who alleged that the complainant had been defiled did not prejudice the appellant since, in any case, the appellant had already been sufficiently and positively identified. Concerning the complaint of the charge sheet being defective, counsel asserted that omission of the appellant's nationality and residence did not occasion a failure of justice, citing section 382 of the Criminal Procedure Code. As regards sentencing, counsel urged that in view of the Supreme Court decision in *Francis Karioko Muruatetu & anor vs. Republic* [2017] eKLR, (Muruatetu) the appellant should be sentenced to 40 years imprisonment.

14. As this is a second appeal, the Court restricts itself to consideration of questions of law only by dint of Section 361(1)(a) of the Criminal Procedure Code. As was held in *David Njoroge Macharia vs. Republic* [2011] eKLR;

> That being so only matters of law fall for consideration–see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see Chemagong v. R [1984] KLR 611."

15. The matters of law left for this Court to consider are; whether the appellant's right to fair trial was breached by the trial court failing to avail him adequate time to read the prosecution statements and prepare for trial, and whether the sentence meted out should be reviewed in view of the Supreme Court decision in Muruatetu.

16. With respect to the claim that the appellant's right to fair trial pursuant to Article 50(2) (c) and (j) of the Constitution was breached, and the trial court failed to accord the appellant representation, yet the offence carried a mandatory sentence, we observe that these two issues have been raised for the first time at the hearing of this second appeal, leading us to surmise that they could well be an afterthought. Even so, we note that the appellant was able to cross-examine all the prosecution witnesses, evincing that the period between 12.18pm and 2.00pm within which he was given to read the witness statements

and prepare for the case was adequate, being minded, however, that ordinarily he ought to have been given more time.

17. Be that as it may, more pertinent to this matter is whether even if there had been a violation, which we say there was not, it should lead to the acquittal of the appellant as urged by his counsel. We think not. Apart from the fact that the appellant did not raise the aforementioned allegations at the earliest for the courts below to address them, we are not persuaded that he was prejudiced to the extent of upsetting his conviction. From the record, the appellant's conviction was based on sound and credible evidence. The 1st appellate court found that indeed the complainant had been sexually assaulted as revealed by the P3 Form, the Post rape care form and the discharge summary. Further, the court observed that the appellant who was a neighbour to the complainant was positively identified as the perpetrator, at the very earliest. In all circumstances of the case, we are of the considered view that there was no violation of a constitutional right sufficient to nullify such an unassailable case.

18. We hold that it is not a light matter to overturn a conviction on the basis of violation of rights absent clear prejudice. We are persuaded by the sentiments in *Musembi Kuli vs. Republic* [2013] eKLR where the Court while dealing with the issue as to whether violation of the right to be brought to court within the constitutional time limits could nullify the entire trial, expressed itself as follows;

> We reiterate what this Court stated in *James Kabwaro Nyasani vs. R Nakuru* Cr. Appeal No. 54 of 2011 (Unreported);
>
> > The appellant's complaint that the original trial was a nullity by reason of alleged violation of his constitutional rights under Section 72(3) of the former Constitution cannot, with respect, succeed. We note that the appellant never raised this issue before the trial court...We view his attempt to raise the said questions here an afterthought ...
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> We also agree with Mr. Chirchir, the learned Senior Prosecution Counsel for the respondent, that even if there had been such violation, which there is not, the appellant's recourse would have been in damages." (Emphasis added)

19. Next, is whether this Court should review the appellant's sentence in view of the apex court's decision in Muruatetu. The trial magistrate sentenced the appellant under the provisions of Section 8 (2) of the Sexual Offences Act which provides for a minimum sentence of imprisonment for life. The 1st appellate court affirmed and upheld the sentence as bound by the law at the time of the delivery of the judgment.

20. The Court in Muruatetu held that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence on a case by case basis. This Court has adopted the reasoning of the Supreme Court and reduced various mandatory sentences on merit. However, subsequently, the Supreme Court revisited its decision in *Muruatetu In Muruatetu & Another vs. Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) and issued directions to the effect that the decision was to apply to the offence of murder under section 203 and 204 of the *Penal Code* and not to mandatory sentences generally. Thus, while we see the obvious injustice that such a position may cause, we are nonetheless bound to abide by those directions and will therefore interfere with the sentence imposed herein. The appellant is not precluded from seeking a review before the appropriate court in the manner proposed in the directions aforesaid.

21. As things now stand, this appeal stands dismissed in entirety.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR