RNK v Republic (Criminal Appeal E077 of 2023)
[2024] KECA 1562 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1562 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E077 OF 2023

KI LAIBUTA, GWN MACHARIA & GV ODUNGA, JJA

NOVEMBER 8, 2024

BETWEEN

RNK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court at Malindi (Mativo, J.) (as he then was) delivered by R. Nyakundi, J. on 14th April, 2020 in Cr. Appeal No. 11 of 2019)

JUDGMENT

1. The appellant, Robert Nzioka Kiilu, was charged with the offence of Incest contrary to section 20(1) of the *Sexual Offences Act*, the particulars of the offence being that, on diverse dates between April 2014 and 20th August 2015 at Kilifi County, he caused his genital organ, namely penis to penetrate the genital organ, namely the vagina of ANN, a child aged 16 years who was, to his knowledge, his daughter. He faced an alternative charge of committing an indecent act with the said child contrary to section 11(1) of the *Sexual Offences Act*.

2. The appellant was tried before the Senior Principal Magistrate's Court (Hon. R. K. Ondieki, SPM) at Kilifi in Sexual Offence Cause No. 486 of 2015, found guilty of the offence of incest and convicted in a judgment delivered on 28th February, 2019.

3. The learned trial magistrate found that, pursuant to section 22(1) of the *Sexual Offences Act*, the complainant fell within the consanguinity degree as the appellant did not deny that he was her father; that the age of the complainant was proved through a birth certificate which showed that she was 17 years of age and, thus, a child; that penetration was proved by the complainant since the issues brought out by the appellant in his defence, such as bad behaviour and the mother's influence, as the reasons behind the charges ought to have been brought out in challenge to the prosecution's evidence and not

at that late stage; and that the prosecution proved its case beyond reasonable doubt. After considering the appellant's mitigation, the learned magistrate sentenced the appellant to serve life sentence.

4. Aggrieved by the said decision, the appellant appealed to the High Court in Malindi High Court Criminal Appeal No. 11 of 2019 on the grounds that the learned trial magistrate: erred both in law and fact by relying on the evidence of a single witness which was insufficient to warrant a safe and a justified conviction; failed to consider sharp contradictions in the prosecution evidence in breach of section 163(1)(c) of the *Evidence Act*; failed to record the demeanour of the prosecution witnesses in contravention of section 199 of the Criminal Procedure Code, thus rendering the resultant trial a nullity; failed to consider that the court coram lacked an interpreter in breach of Article 50(2) (m) of *the Constitution* and that the appellant was denied the right to information disclosure prior to taking plea in breach of Article 50(2) (j) of *the Constitution*, 2010 and that, therefore, his constitutional right was violated; and failed to consider that the sentence meted on the appellant was manifestly harsh and excessive in all the circumstances in breach of Article 50(2) (p) of the Constitution. The appellant urged the court to quash his conviction and set aside the sentence.

5. After hearing the appeal, the learned Judge (Mativo, J.) in a judgement delivered by Nyakundi, J. on 14th April, 2020 upheld the conviction but substituted the life sentence for 30 years' imprisonment to run from the date of conviction.

6. In his judgment, the learned Judge found that the defence offered by the appellant was properly rejected and, therefore, the learned magistrate did not misdirect himself; that Article 50(2) (m) and (j) of *the Constitution* was not violated as claimed by the appellant; and that a harsh sentence was warranted, but that the life imprisonment meted on the appellant was excessive.

7. Aggrieved, the appellant has lodged this second appeal in which he contends that the learned Judge: erred in law by upholding conviction of the Magistrate's Court without considering the discrepancies and irregularities in witness testimonies in violation of section 163(1) (c) of the *Evidence Act*; failed to consider the appellant's defence in violation of sections 161, 306(2), 307(1), 308, 309 and 310 of the *Evidence Act*; failed to appreciate that the case was poorly investigated contrary to Article 243 of *the Constitution* and section 24 of the *National Police Service Act*; and by upholding the appellant's conviction without considering that the hearing was unfair, and that Article 50(1) of *the Constitution* and section 22 of the *Evidence Act* were violated. He urged this Court to allow his appeal, quash his conviction and set aside the sentence.

8. We heard the appeal on the Court's virtual platform on 12th June 2024 when the appellant appeared in person from Malindi prison while learned prosecution counsel, Ms. Nyawinda, appeared for the respondent. The appellant relied on his written submissions with minimal oral highlights while Ms. Nyawinda addressed the Court orally.

9. In his written submissions, the appellant cited the case of Mutonyi v Republic (1982) KLR 203 on the definition of, and the effect of, lack of corroboration on the accused's guilt; Republic v Mamlal Ishwerial Purchit (1942) EACA on the first appellate court's duty to re-evaluate the evidence in order to ascertain that the offence was proved; PWW v Republic [2017] eKLR on the proposition that contradictions are a manifestation of doubt which ought to be construed to the benefit of the accused person; and Joseph Ndungu Kagiri v Republic [2016] eKLR for the proposition that the Court is the custodian of the law, and that it ought to ensure that the constitutional safeguards are seriously protected and upheld at all times.

10. It was submitted by the appellant that there were unreconciled contradictions in the prosecution witnesses' evidence; that, while it was PW1's evidence that he slept at a cousin's house, PW2 stated that PW1 slept at her cousin's called S; that, while PW1 stated that the incident occurred sometime in April

2014 on a day he could not recall, the P3 Form indicated the date as 2nd April 2014; that, while PW1 stated that she reported at the police station, PW2 stated that the incident was reported at the DO's office in Matano Mane; that his defence evidence and that of his witnesses DW2 and DW3 were not considered by the learned magistrate in violation of sections 161, 306(2), 307(1), 308, 309 and 310 of the Criminal Procedure Code; that, if the learned trial magistrate felt that the issues the appellant had raised in his defence were not raised when the prosecution's witnesses testified, the respondent ought to have been afforded an opportunity to rebut the appellant's evidence instead of brushing the defence evidence as an afterthought; that the matter was not properly investigated in order to find out the truth about the allegations made by the appellant in his defence; that, whereas the P3 form was filled in by Dr. Busra, it was produced by Dr Daisy Juma; that the incident was reported to the hospital on 18th September 2015 by which time he had already taken plea; that the medical document ought to have been obtained before he was arraigned in court; and that there were errors and contradictions in the medical report, which ought to have raised doubts regarding the evidence of PW4. We were urged to re- evaluate the matter and find that the charge against the appellant was stage-managed and fabricated.

11. On her part, Ms. Nyawinda submitted that incest was proved beyond reasonable doubt; that the issues raised by the appellant in this appeal were merely factual, which this Court is barred from entertaining; and that the appeal should be dismissed.

12. On our consideration of this appeal, we find that the issues for our determination are:

    1. whether there were contradictions in the prosecution case;
    2. whether the defence was considered;
    3. whether the prosecution proved its case beyond reasonable doubt;
    4. whether the case was properly investigated;
    5. whether the hearing was unfair; and
    6. whether the sentence was harsh and excessive.

13. Before dealing with the above issues, this being a second appeal, it is important to restate our jurisdiction in such matters. Section 361(1) of the Criminal Procedure Code provides that:

> A party to an appeal from a subordinate court may, subject to subsection (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.

14. This provision was applied in Karani v R [2010] 1 KLR 73 where it was held that:

> " 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."

15. In matters where our jurisdiction is confined to matters of law only, this Court in the case of Stephen M'Irungi & Another v Republic [1982-88] 1 KAR 360 held that we have:

> " loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law."

16. In this appeal, we are therefore bound, as was held in the decision in Adan Muraguri Mungara v R CA Cr App No 347 of 2007:

> " to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere."

17. The appellant submitted that there were contradictions in the prosecution's case. A contradiction, it has been held, means lack of agreement between two related facts and that evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated, and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains. See the decision of the Court of Appeal of Nigeria in the case of David Ojeabuo v Federal Republic of Nigeria [2014] LPELR-22555 (CA).

18. The law is that, where prosecution witnesses have given conflicting version of material facts in issue, the trial judge before whom such evidence is led must make specific findings on the point and, in so doing, give reasons for rejecting one version and accepting the other. Unless this is done, it will be unsafe for the court to rely on any of the evidence before it. See the persuasive Nigerian case of Onubugu v State 119741 9 S.C.1 Kem vs. State (1985)1 NWLR.

19. However, the omission to reconcile contradictory statements may be cured on a first appeal by re-evaluating the evidence, subjecting it to a fresh scrutiny and arriving at finding thereon. The failure by the first appellate court to reconcile material conflicting evidence may well justify interference by this Court since as this Court held in Philip Nzaka Watu v Republic [2016] eKLR:

> " It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt."

20. However, where the first appellate court has reconciled the contradictions and the inconsistencies and arrived at the same conclusion as the trial court, that finding, in our view, amounts to concurrent finding of fact, and the matter is no longer open to this Court to consider unless it is shown that the finding was based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. This Court

explained the respective roles of the trial court, the first appellate court and the second appellate court in the case of Erick Onyango Ondeng' v Republic [2014] eKLR where it was held that:

> " 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, 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). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below 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, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

21. We have considered the record as placed before us. Apart from alluding in the grounds of appeal before the learned Judge to the fact that the learned magistrate failed to consider sharp contradictions in breach of section 163(1) (c) of the *Evidence Act*, the submissions before the learned Judge did not expound on this issue. In his judgement, the learned Judge expressed himself as hereunder:

> " ...in order to determine whether there is any merit in any of the submissions made by the respective parties in this appeal, this court must consider the evidence led in the trial court, juxtapose it against the judgement by the trial court, and finally determine whether there is any basis for interfering with the said judgement. This means that if a court of appeal is of the view that a particular fact is so material that it should have been dealt with in the judgement, but such fact is completely absent from the judgement or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. The appeal court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgement, in the sense that it justifies interference by the court of appeal. I find no misdirection in the manner in which the trial court analysed the law and the evidence."

22. Although the learned Judge did not refer to particular instances of inconsistencies noted, it is our view that, considering the omission by the appellant to direct the learned Judge to specific instances of the alleged inconsistencies and contradictions, the above finding by the learned Judge covered the issue raised before him and, being a finding of fact, we cannot revisit it.

23. The appellant also complained that his defence and the evidence of his witnesses was never considered. In his judgement, the learned Judge expressed himself on the issue as follows:

> " I find that the defence offered by the appellant was properly rejected. Having considered the circumstances of this case, the prosecution evidence and the evidence offered by the appellant, I am persuaded that the trial Magistrate did not misdirect himself in considering

> and rejecting the appellant's defence. The explanation offered by the appellant and his two sons is in my view improbable and does not cast reasonable doubt on the prosecution case... The prosecution case weighed against the appellant's defence leaves me with no doubt that the appellant did not rebut the allegations against him. His defence did not address the key allegations. The learned Magistrate weighed his defence and did not believe it. It is my finding that the evidence tendered by the prosecution sufficiently proved the offence and irresistibly pointed to the appellant's guilt."

24. The learned Judge having reviewed the judgement of the learned trial magistrate, and having agreed with the learned trial magistrate that the appellant's defence was for rejection, we find no reason to interfere with that finding of fact.

25. On whether the prosecution proved its case beyond reasonable doubt, the law is that, for the prosecution to prove its charge of incest to the required standard, three key ingredients are necessary. These are the complainant's age, the appellant's identity and relationship to the complainant, and whether there was penetration. See GMM v Republic [2019] eKLR. No issue arises in this appeal as regards the complainant's age and her relationship with the appellant. The only issue for determination is whether there was penetration of the complainant's genital organ into that of the appellant. According to the complainant, the appellant forced her to have sex with him on two occasions, claiming that he had always given her whatever she wanted, and that it was only fair that she pays back. The first time the incident occurred, the appellant sent the complainant's siblings away in order to be alone with the complainant. It was only after the second incident that the complainant ran away to her grandparents. The two courts below found that the appellant did have sex with the complainant. We have no basis for interfering with the concurrent findings of the two courts below on that issue.

26. As to whether the case was properly investigated, PW3 testified that he received the report of defilement of the complainant, which took place in April 2014 and on 20th August 2014, on 14th September 2015. In cross- examination, he clarified that the complainant was referred to Kilifi County Hospital on 18th September 2015 and not 18th August 2015 as stated in his evidence-in- chief. According to the P3 form, it was filled in on 18th September 2015. The appellant complained that by the time of the examination, he had already been arraigned in court. It is true that the appellant was arrested on 14th September 2015 and was arraigned in court on 15th September 2015. However, the fact that the complainant was examined after the appellant's arraignment does not, in our view, render the investigations defective. The law required that the appellant be arraigned in court within 24 hours of his arrest and, having taken the statement from the complainant, nothing barred PW3 from presenting the appellant in court for plea taking if he was satisfied that he had sufficient evidence to charge the appellant.

27. Although the usual proof of sexual intercourse is by the victim's own evidence corroborated by the medical evidence or other evidence, it is now settled that the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. While it is desirable that the victim's medical examination report be adduced in evidence, there is no hard and fast rule that that must be done in every case of defilement to prove sexual intercourse or penetration. What matters is that the evidence required to prove such a case must be such that it is sufficient to prove the case beyond reasonable doubt. See the Supreme Court of Uganda decision in Bassita v Uganda S.C. Criminal Appeal No. 35 of 1995.

28. As to whether the appellant's trial was unfair, the learned Judge considered the submissions before him which, in respect of the complaint that there was no interpretation of the proceedings and that the appellant was not supplied with witness statements and, while noting that the appellant was

represented by an advocate, found no substance in the said submissions. We likewise find no merit in the submission that the appellant was not afforded a fair hearing.

29. Regarding the submission that the sentence was harsh and excessive under section 361 of the Criminal Procedure Code, severity of sentence as opposed to its legality is a question of fact and we are precluded from considering that allegation at this stage.

30. We find no merit in this appeal and hereby dismiss it in its entirety. The decision of the High Court is hereby upheld.

31. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF NOVEMBER, 2024.

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR