**Komen v Republic (Criminal Appeal E013 of 2022)**
**[2023] KEHC 17861 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17861 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KABARNET**

**CRIMINAL APPEAL E013 OF 2022**

**RB NGETICH, J**

**MAY 25, 2023**

**BETWEEN**

**CHIRCHIR KOMEN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal against conviction and sentence from the Judgment and/or Decree of Honourable V.O. Amboko (RM) dated at Kabarnet Magistrate's Court Sexual Offence Case No. 11 of 2020 on 25th February, 2022)***

## JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act* No 3 of 2006. The particulars being that on diverse dates between April 14, 2020 and 17th day of April,2020 at unknown time in Marigat Location Baringo South Sub-County within Baringo county the accused intentionally and unlawfully caused his penis to penetrate the vagina of CJC a child aged 13 years.

2. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No 3 of 2006. The particulars being that on the diverse dates between 14th day of April, 2020 and 17th day of April, 2020 at unknown time in Marigat Location in Baringo South Sub-County within Baringo County the accused intentionally touched the vagina, breasts and buttocks of CJC a child aged 13 years with his penis.

3. The Appellant denied both the main and alternative charge and the case proceeded for full trial with the prosecution calling 4 witnesses in support of their case. The accused gave unsworn statement in his defence. By the judgment delivered on February 25, 2022, the lower Court found the Appellant guilty of the main charge and convicted him and on the 3/03/2022, the trial court sentenced him to 20 years' imprisonment.

4. The Appellant being aggrieved and dissatisfied with the conviction and sentence, filed this appeal on the March 14, 2022 challenging conviction and sentence on the following grounds:

    i. That the trial magistrate erred in law and in fact by convicting the Appellant based on evidence that did not observe the provisions of section 35 & 36 of the *Sexual Offences Act* No 3 of 2006.

    ii. That trial magistrate grossly misdirected herself by convicting the Appellant without proper analysis of the fact that section 150 of the *CPC* was greatly breached when they declined to recall PW1 as earlier ordered.

    iii. That the trial magistrate grossly misdirected herself by convicting the Appellant without proper analysis of the fact that PW1, the victim did not implicate the Appellant directly into the offence.

    iv. That the trial magistrate greatly erred in law and fact by convicting the Appellant without proper analysis of the fact that there existed a lot of errors in the P3 Form.

    v. That the trial magistrate erred in law and in fact by convicting the Appellant without proper analysis of the defence of alibi that he adduced.

    vi. That the trial magistrate greatly erred in law and fact by convicting the Appellant based on hearsay, fabricated and far-fetched evidence against the rule of the *evidence Act*.

5. On 19.01.2023 the Appellant filed a summarized grounds of appeal as follows:

    i. Violation of the appellants right to fair trial under Article 50(2)(e), 27, 25(c), 159(2) (b) and 47 of *the Constitution of Kenya 2010* and Sections 37 and 108 of the CPC.

    ii. That the trial magistrate grossly misdirected herself by convicting the Appellant without proper analysis of the fact that section 150 of the *CPC* was greatly breached when they declined to recall PW1 as earlier claimed.

    iii. Violation in regard to the appellant's defence alongside the prosecution's evidence.

6. The appeal was canvassed by way of written submissions, both the Appellant and the Respondent filed written submissions.

**Appellant's Submissions**

7. On the issue of violation of the Appellants right to fair trial, the Appellant submitted that he was arrested on the April 17, 2020 and presented to court after 3 days and the delay of presenting him to court was not explained by the police in total breach of the provisions of Articles 49(1)(f) of *the constitution* of Kenya, 2010, Section 37 and Section 108 of the CPC and submits that once arrested a suspect has to be presented in court within the stipulated time and the trial court breached Article 27(1), 4, (22) when it went silent and went ahead to try the Appellant.

8. The Appellant submitted that the trial court misdirected itself by convicting him without proper analysis of the fact; that section 150 of the *CPC* was greatly breached by failure to recall the complainant (PW1). The Appellant submits that the matter proceeded midway after which he engaged an Advocate to represent him during the hearing and the Advocate applied to recall PW1 (complainant) and the doctor and the court allowed the application but only the doctor was recalled and the prosecution failed to recall the complainant as ordered.

9. The Appellant submitted that the clinical officer on being recalled for cross examination testified that he examined the complainant 5 days after the incident and upon examination he found that the hymen was broken and it was old and not within the duration that she was defiled.

10. The Appellant relied on the case of Joseph Njiru Kathaka v republic Embu High Court CRA No 14 of 2013 where the court held that the findings of the magistrate that the hymen was broken thus proving penetration was not founded on sound evidence. That the medical report produced by the medical officer did not establish when the hymen was broken but he said that the broken hymen was old meaning it was broken even before the incident.

11. The Appellant further relies on the case of Michael Odhiambo v Republic Nakuru HCCR No 280 of 2004 where the court held that the rapture of the hymen was not a conclusive proof of defilement. The rapture of the hymen in small girls could be caused by other factors like vigorous exercise.

12. The Appellant further submitted that the court placed him on his defence where he gave unsworn statement and raised a defence of alibi but the court failed to consider his defence of Alibi

13. In conclusion, the Appellant submitted that the prosecution's case was not proved beyond reasonable doubt and urged this court to allow his appeal, quash the conviction and set aside sentence and he be set at liberty.

**Respondents Written Submissions**

14. On whether the provisions of Section 35 and 36 of the *Sexual offences Act* No 3 of 2006 were observed by the trial court, the Respondents submits that the learned trial magistrate could not invoke the provisions of Sections 35 and 36 of the *Sexual offences Act* No 3 of 2006, because the issue of ailment of the appellant was not raised at the beginning, in course of trial or during mitigation. They submit that the purpose for which those provisions may be invoked by the court is clearly stated and that in this case, the court was not called upon by the appellant to invoke the same.

15. As to whether the provisions of Section 150 of the criminal procedure Act was complied with by the court, the Respondent submits that the provisions of section 150 of the criminal procedure Act are not coached in mandatory terms and it is only in those cases where it appears to it essential to the just decision of the case.

16. On whether the evidence of Pw 1 was properly analyzed, the Respondent submitted that the evidence of Pw 1 was analyzed by the trial court contrary to the assertion by the Appellant; that Pw 1 was categorical that she knew the Appellant well before the incident and there was no error of identification of the Appellant.

17. On whether there were errors on the P3 form that would exonerate the appellant from guilt, the Respondent submitted that the Appellant has not shown or demonstrated that there were errors in the P3 form which would in any material sense water down evidence by the prosecution against the Appellant and if there were any errors, the same did not go to the core of the case.

18. On whether the Appellant's defence was considered by the trial court, the Respondents submits that the trial court considered the defence of the Appellant and made a finding that for various reasons given, the same could not stand.

19. In conclusion, the Respondent submits that evidence adduced by prosecution clearly shows the case was proved beyond reasonable doubt as evidence adduced was systematic, consistent, corroborative and above all, unchallenged by the defence. The Respondent urged this court to dismiss the appeal and uphold the conviction and sentence.

**Analysis and Determination**

20. This being the first Appellate Court I am obligated to reevaluate the evidence adduced before the trial court and arrive at an independent determination. This I do while aware of the fact that unlike the trial court, I never got an opportunity to take evidence first hand and observe the demeanor of witnesses. For this I give due allowance. The principles that apply in the first appellate court are set out in the case of *Okeno v Republic* [1972] EA 32 where it was stated as follows:-

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v Sunday Post, [1958] EA 424.)"

21. In view of the above I have perused and considered evidence adduced before the trial court together with submissions herein. From evidence adduced I find issues for consideration by this Court as follows:

    i. Whether ingredients for the offence of defilement were proved beyond reasonable doubt.

    ii. Whether the trial court violated the provisions of Article 50(2) (e), Article 27, 25(c), 159(2)(b) of Kenya 2010 and section 37 and 108 of the CPC.

    iii. Whether the trial court breached the provisions of Section 150 of the CPC by failing to recall the complainant.

    iv. Whether the court considered the Appellants defence of alibi.

**i. Whether ingredients for the offence of defilement were proved beyond reasonable doubt.**

22. The Appellant argued that the trial magistrate erred in fact and in law by convicting the Appellant on the evidence that was not properly analyzed. There is no doubt that three ingredients need to be proved beyond reasonable doubt in respect to the offence of defilement; the ingredients being age of the minor, penetration and identification of the assailant.

**a. Age**

23. A birth certificate showing that the Complainant was born on February 10, 2007 was produced in Court as Exhibit 4. Authenticity of the birth certificate was not challenged; this therefore confirm that the girl was 13 years old at the time of the offence.

**b. Penetration**

24. Penetration is defined under Section 2 of *Sexual Offences Act* No 3 of 2006 defines penetration as follows:

> " Partial or complete insertion of a genital organ of a person into the genital organ of another person."

25. The medical evidence adduced by the Clinical Officer (Pw3) confirm that upon examination of the genitalia, the labia minora was intact but had some minor bruises at the labia minora and majora. The

medical officer concluded that there was forced penetration because of the bruises. From the medical evidence therefore, there is no doubt that there is proof of penetration; this is further corroborated by the fact that the complainant testified that the Appellant had sexual intercourse with her.

**c. Identification Of Perpetrator**

26. Evidence adduced before the trial court show that the Appellant picked the complainant in his boda boda together with another whom he later dropped hence remaining with the complainant. He took her to his house and defiled her; later in the evening, he took her to the house of his friend (C) where he repeatedly defiled and locked her up for three days.

27. From the testimony of the complainant, it is clear that the complainant spent a long period of time with the Appellant hence she could positively identify him.

28. Further to the above, the Accused person confirmed that he picked the complainant on the date she disappeared, but denied defiling her. In view of the above, there is no doubt that the Appellant was positively identified as the person who defiled the Complainant.

**ii. Whether the Appellant's constitutional rights were violated**

29. The Appellant argues that his constitutional rights were violated. He submitted that he was arrested on the 17/04/2020 and presented to court after 3 days and the delay of presenting him to court was not explained by the police in total breach of the provisions of Articles 49(1)(f) of *the constitution of Kenya, 2010*, Section 37 and Section 108 of the *CPC*.

30. Article 49 (f) of *the Constitution* gives an arrested a right to be brought before a Court as soon as reasonably possible, but not later than twenty-four hours after being arrested and if twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.

31. I have perused and considered the record of the trial court. The charge sheet shows that the appellant was arrested on April 17, 2020 and arraigned in court on April 20, 2020. It is not disputed that there was a delay in arraigning the appellant in court which as a consequence was in breach of the above Article of *the Constitution*. The consequence of such violation was pronounced in the case of *Julius Kamau Mbugua v Republic* [2010] eKLR, thus;

> " In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensate able by damages."

32. In the case of *Musa Shaban Kabughu v Republic* [2020] eKLR the court had this to say;

> " In other words, the violation of the appellant's right to be produced in court within 24 hours did not automatically result in a right to an acquittal from the offence he faced. Instead, it would give rise to a claim for damages, and the appellant was at liberty to claim for the violation of his Constitutional rights. On this basis, we do not consider the delay in his arraignment in court to have been unreasonable or fatal to the prosecution's case. This ground is dismissed"

33. From the above decided case it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. The only remedy available for the accused is to channel his grievances to the constitutional court for legal remedies for violation of his rights and for that reason, this ground is dismissed.

**iii. Whether the trial court breached the provisions of Section 150 of the CPC on failing to recall the complainant.**

34. Section 150 of the *CPC* provides that:

> " A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:
>
> Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

35. A perusal of the trail court file indicates that on July 14, 2021, the appellant through his advocate Mr Chepkilot made an application seeking to re-open the prosecution's case to recall Pw1 (complainant) and the Doctor; the prosecutions objected to the application. On July 22, 2021 the Court delivered a ruling allowing the application by defence counsel to re-open the case and the matter was set down for hearing on the August 11, 2021.

36. On the November 4, 2021 after trying to avail the complainant on several occasions to court for further cross examination, the prosecutor informed the court that they had a letter from the complainant's school indicating that she was last in school on March 17, 2020 and cannot be traced. In response, Mr. Chepkilot counsel for the accused informed the court that the reasons given for failure to avail the complainant were not sufficient and proceeded to tell the court that they had decided to abandon the re-call of Pw 1 and urged the Court to proceed with other witnesses.

37. From the above, it is clear that the defence/accused opted not to pursue recall of pw1; the appellant was not therefore denied the right to recall the complainant.

**iv. Whether the court considered the Appellants defence.**

38. The appellant stated on appeal that his defence of alibi was not considered by the trial court. I have perused the judgment and in my view the learned magistrate considered both the prosecution and the

defence case and came to the conclusion that the version of the defence was not believable. The trial court on paragraph 27 of the judgement stated as follows:-

> " The accused person's defence was a mere denial and did not raise any doubt in the court's mind. The evidence adduced did not establish any grudge between the complainant and the accused. I did not find any reason that would lead the complainant to fabricate evidence in a bid to frame the accused person".

39. From the foregoing, I find that the Appellant's defence was considered by the trial court. I therefore see no merit in this appeal on both conviction and sentence.

DIVISION -

40. Final Orders

    1. Appeal is hereby dismissed.

    2. Appellant to serve the remaining sentence.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 25TH DAY OF MAY 2023.**

**.....**

**RACHEL NGETICH**

**JUDGE**

**In the presence of**

Mr. Kemboi - Court Assistant.

Ms Ratemo for the state.

Appellant present.