Koech alias Ronald Wandress v Republic (Criminal Appeal E023 of 2022)
[2023] KEHC 22842 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22842 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E023 OF 2022

RL KORIR, J

SEPTEMBER 27, 2023

BETWEEN

KIPLANGAT KOECH ALIAS RONALD WANDRESS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number 65 of 2019 by Hon. Kibelion K. in the Principal Magistrate's Court at Bomet)

JUDGMENT

1. The Appellant herein was convicted by Hon. K. Kibelion, Principal Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on 24th May 2019 at around 1900 hours in [Particulars withheld] Village within Bomet County, he intentionally caused his penis to penetrate the vagina of L.C, a child aged 15 years.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 24th May 2019 at around 1900 hours in [Particulars withheld] Village within Bomet County, he intentionally touched the vagina of L.C, a child aged 15 years with his penis.

3. The Appellant pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called seven (7) witnesses in support of its case.

4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.

5. At the conclusion of the trial, he was convicted on the charge of defilement and sentenced to serve twenty (20) years in prison.

6. Being dissatisfied with the Judgment dated 19th May 2022, Kiplangat Koech (Accused) appealed to this court on the following grounds reproduced verbatim:-

   i. That I pleaded not guilty at the trial and still maintain the same.

   ii. That the trial Magistrate erred in both law and fact by relying on uncorroborated evidence.

   iii. That the trial Magistrate erred in both law and fact by relying on evidence adduced by the Prosecution side which was inconsistent and full of irregularities.

   iv. That the trial Magistrate erred in both law and fact by failing to analyze that the entire evidence was manufactured, manipulated and framed to meet the predetermined goal of fixing him.

   v. That the trial Magistrate erred in both law and fact by failing to analyze the entire evidence adduced by the Prosecution hence I was not medically examined and DNA was not done as stipulated in section 36(1) of the *Sexual Offences Act* No. 3 of 2006.

   vi. That the trial Magistrate erred in both law and fact by rejecting my plausible defence without any further explanation to it.

   vii. That I pray to be present during the hearing of this Appeal.

7. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. The Court of Appeal in the case of Mark Ouiruri Mose vs Republic (2013) eKLR, held that:-

> " That this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that"

The Prosecution's Case.

8. It was the Prosecution's case that the Appellant defiled L.C (PW1) on 24th May 2019. PW1 testified that she was defiled by the Appellant on the material day as she and PW4 headed back home from the posho mill. That the Appellant grabbed her and pulled her to a nearby fence and he inserted his penis into her vagina

9. Julius Magut (PW7) who was the clinical officer testified that he examined the minor (PW1) on 27th May 2019 and found that her neck had scratch marks. It was his further testimony that he found bruises and lacerations in her vagina and that her hymen was broken.

10. It was PW7's further testimony that upon doing a vaginal swab, he found red blood cells and epidural cells and they formed his opinion that there had been vaginal penetration.

The Appellant's Case.

11. The Appellant, Kiplangat Koech denied committing the offence. He stated that the Prosecution's witnesses lied and that the present case was as a result of family differences.

12. Wesley Kibet Mutai (DW2) and Daniel Sang (DW3) both testified as the Appellant's witnesses and their testimonies revolved around events that occurred on 5th May 2021 where they stated that they found the complainant asking for help from the Accused as she was being dragged by a motorcyclist. They further testified that the Appellant did not commit he offence he was charged with.

13. On 22nd February 2023, I directed that this appeal be dispensed off by way of written submissions.

The Appellant's Submissions.

14. It was the Appellant's submission that the Prosecution did not prove its case beyond reasonable doubt. That the PRC form did indicate whether the complainant's hymen was freshly torn or old or whether she had lacerations. It was his further submission that there was no test done to establish the presence of spermatozoa in the victim's vagina.

15. The Appellant faulted the contents of the PRC and P3 forms stating that they are not corroborative. submitted that without the treatment notes, the P3 and PRC forms could not be relied upon as a basis for a conviction.

16. It was the Appellant's submission that the age of the victim was not proved as no age assessment was conducted on the complainant. He relied on Alfayo Gombe Okello vs. Republic Cr. App 203 of 2009 (Kisumu). He maintained that there was no evidence that the complainant was under 18 years old.

17. The Appellant submitted that it was unsafe to rely on the Prosecution's evidence which raised doubt. He relied on Ndungu Kimanyi vs Republic (1979) KLR 283. That other than PW1's evidence that the Appellant penetrated her vagina, the medical evidence did not support this claim. He relied on Geoffrey Otieno vs Republic Cr. Appeal No. 22 of 2020.

The Prosecution's/Respondent's Submissions.

18. The Respondent submitted that the victim was aged 15 years at the time of the incident. That a Birth Certificate (P.Exh1) was produced and it proved that she was aged 15 years old.

19. It was the Respondent's submission that the victim testified that the Appellant grabbed her from the road and had sex with her without protection. That after the forceful penetration, she bled from her vagina. It was the Respondent's further submission that the medical evidence corroborated that fact and further showed bruises and lacerations on her vagina and a broken hymen.

20. The Respondent submitted that PW2 who was the victim's mother testified that she saw the victim bleeding from her vagina and that the victim's soiled underpant was produced in court as an exhibit. They further submitted that an act causing penetration was committed against the victim.

21. It was the Respondent's submission that the Appellant who defiled PW1 was her neighbour and that at the time of the offence, the scene was well lit by street lights. That further, the Appellant was positively identified by PW3, PW4 and PW5 who were all present at the scene and saw him attack the victim and drag her towards a bush.

22. The Respondent submitted that PW5's evidence was compelling as he testified that he found the Appellant at the scene dragging the victim to the bush and when he tried to rescue the victim, he was assaulted by the Appellant forcing him to flee. That further, all Prosecution witnesses denied the existence of a grudge. They further submitted that PW5 was not a member of the victim's family and was therefore an independent witness.

23. It was the Respondent's submission that the Appellant's witnesses testified on the events of 5th May 2021 which was not material to the present case and that their evidence was irrelevant.

24. The Respondent submitted that the trial court gave the Appellant the chance to mitigate to which he did and expressed no remorse. That upon application of section 8(3) of the *Sexual Offences Act*, the 20 year sentence was appropriate considering the age of the victim.

25. The Respondent submitted that they had proven all the elements of the offence beyond reasonable doubt.

26. On identification, it was the Appellant's submission that the victim did not positively identify the culprit and that only left the court with dock identification which was misleading and could cause a miscarriage of justice. He submitted that Moses, Janet and other neighbours were not brought to court by the Prosecution to testify.

27. On sentence, Appellant submitted that he was not medically examined. It was his further submission that the trial court did not take into account his mitigation and erred when it issued a mandatory minimum sentence.

28. It was the Appellant's submission that this court should interfere with the sentence by either setting him at liberty, reducing the sentence or order a retrial.

29. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal filed on 5th June 2022, the Appellant's Written Submissions filed on 22nd February 2023, and the Respondent's Written Submissions dated 10th March 2023. I discern the following issues arise for my determination: -

    i. Whether the Prosecution proved its case beyond reasonable doubt.

    ii. Whether the Defence displaces on the Prosecution case.

    iii. Whether the Sentence preferred against the Accused was manifestly excessive, harsh and severe.

i. Whether the Prosecution proved its case beyond reasonable doubt.

30. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.

31. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an Accused person. The age of the victim may be proved through the production of a birth certificate or a parent's testimony.

32. Rule 4 of the Sexual Offences Rules of Court 2014 provides that: -

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

33. No. 96190 PC Irene Kemboi (PW6) produced a Birth Certificate and the same was marked P.Exh 1. The Birth Certificate indicated that L.C (PW1) was born on 12th February 2004. The authenticity of the Birth Certificate or its production was not challenged during the trial.

34. AR (PW2) who was the victim's mother testified that PW1 was 15 years at the time of the commission of the offence. In the case of Richard Wahome Chege vs Republic (2014) eKLR, the Court of Appeal held as follows:-

> " .....PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth?....."

35. Flowing from the above I find the Birth Certificate (P.Exh 1) admissible and based on its contents and the testimony of PW2, it is my further finding that the time of the commission of the alleged offence, L.C was aged 15 years. The age of the victim was therefore conclusively proven.

36. With regard to identification, I am conscious of the need to carefully examine the evidence by the Court of Appeal in the case of Cleophas Wamunga vs Republic (1989) eKLR. The Court expressed itself as follows: -

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger....."

37. It was clear from the record that the alleged incident happened at around 7 p.m. To this end, I take the caution in the case of Nzaro vs Republic (1991) KAR 212 held that:-

> " Identification/recognition at night must be absolutely watertight to justify conviction".

38. The victim (PW1) testified that on the material day, while in the company of her younger sibling PW4, the Appellant attacked her as she was going home from the posho mill. That the Appellant grabbed her by her neck, pulled her to the nearby bush and defiled her. When she was cross examined by the Appellant, she confirmed that he had defiled her and that there was sufficient light at the scene of the offence which was in High 5 estate.

39. JC (PW3) testified that when PW4 informed her that PW1 had been attacked by the Appellant, she ran towards the scene and upon arrival, she found the Appellant trying to remove dirt from PW1. That PW1's clothes and sandals were torn. When she was cross examined by the Appellant, she stated that she heard him threatening PW1 not to report the incident.

40. MN (PW4) testified that he was with PW1 on the material day and on the material time and as they walked back home, the Appellant begun following them and he afterwards held PW1. That when one motorcyclist tried to help them, he was wrestled to the ground by the Appellant. When he was cross examined by the Appellant, he stated that he heard the Appellant's voice and that he knew his voice as they had interacted with him before.

41. Shadrack Koech (PW5) testified that on the material day at around 8 p.m., he found the Appellant with PW1 and PW4 quarrelling and when he stopped to ask what was happening, the Appellant slapped him. That PW1 was shouting and asking the Appellant to leave her alone. When he was cross examined by the Appellant, he stated that there were sufficient street and security lights around High 5 estate.

42. In addition to the above, PW1, PW2, PW3 and PW4 stated that they knew the Appellant as he was their neighbour. The Appellant confirmed the same in his defence that she knew PW1 as she was his neighbour.

43. This evidence in my view is more of recognition than identification. In the case of Peter Musau Mwanzia vs Republic (2008) eKLR, the Court of Appeal expressed itself as follows:-

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a

long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident....."

44. Flowing from the above, there is no doubt in my mind that the Appellant was well known to PW1 as they were neighbours. PW2 also identified the Appellant as the perpetrator in the dock.

45. I am satisfied that PW1's evidence in relation to identification was free from error and that the Appellant was placed in the scene of the offence by PW1, PW2, PW3, PW4 and PW5. It is my finding that the Appellant was positively identified as the perpetrator of the offence.

46. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. In the case of Bassita vs Uganda S. C Criminal Appeal Number 35 of 1995, the Supreme Court held that:-

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence....."

47. The element in the offence is penetration. Penetration can be proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred.

48. L.C (PW1) testified that on the material day, the Appellant grabbed her by her neck and pulled her to the nearby bush where he removed his trouser and inserted his penis into her vagina. When the Appellant cross examined PW1, she confirmed that he defiled her on the material day.

49. Julius Magut (PW7) who was the clinical officer at Longisa Hospital testified that when he examined PW1, he found that her hymen was broken. That her vagina had bruises and lacerations. PW1 further stated that he conducted a vaginal swab and found red blood cells and epidural cells and it was on the basis of these that he stated that there had been vaginal penetration.

50. PW7 produced P3 and PRC Forms that were marked as P.Exh 2 and 3 respectively. The PRC form (P.Exh 3) indicated that PW1 had been examined on the material day and she was found to have bruises on the neck, warm vaginal discharge and lacerations on the labia/vulva. The P3 Form (P.Exh.2) indicated that at the time of examination, PW1's injuries were about three days old. The findings on the P3 Form were that PW1 had a broken hymen and that she had bruises and lacerations on the labia minora. I am satisfied based on the testimonies of PW1 and PW7 and the contents of the P3 and PRC forms which were consistent with each other that L.C (PW2) was penetrated on the material day. There were no contradiction as submitted by the Appellant.

51. The Appellant stated that he was not medically examined as stipulated under Section 36(1) of the *Sexual Offences Act*. Section 36(1) of the *Sexual Offences Act* provides that: -

> Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

52. In expounding Section 36(1) of the *Sexual Offences Act*, the Court of Appeal in the case of Robert Mutungi Mumbi vs Republic (2015) eKLR, held that: -

> " Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

53. It was therefore not mandatory for the Appellant to be medically examined to provide a link between him and the offence. What the Prosecution needed to prove in the charge of defilement was among others, penetration, which they have.

54. The Appellant submitted that there was no test done to establish the presence of spermatozoa in the victim's vagina. The law however does not require the presence of spermatozoa as proof of penetration. The Court of Appeal in the case of Mark Ouiruri vs Republic (supra), expressed itself on this matter as follows:-

> " ..... and the effect that the medical examination was carried out on her on 16th November 2008, five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event, the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and the penetration need not be deep inside the girl's organ...."

55. In further submissions, the Appellant faulted the Prosecution for not calling one Moses, Janet and other neighbours to testify. I have gone through the trial record and I have noted that Janet Chepkorir and Moses Ndubi testified as PW3 and PW4 respectively. In any case this court holds the position that the Prosecution has the discretion on the number of witnesses it wishes to call. The court cannot therefore dictate or compel the Prosecution on the number of witnesses it should avail unless it was clear to the court that a particular witness would advance the cause of justice and was therefore necessary. Section 143 of the *Evidence Act* provides as follows: -

> No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.

56. In Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005 the Court of Appeal held as follows:-

> " ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

57. It is my finding that the Prosecution evidence was sufficient as they were able to establish the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

ii. Whether the Defence places doubt on the Prosecution case.

58. I have considered the Appellant's defence in which he denied committing the offence. He stated that the Prosecution's witnesses lied to the trial court. When he was cross examined, he stated that the PW1's family wanted to fix him. That his father had earlier been accused of defiling PW1 but the matter was sorted out at the village level. It was his further testimony upon cross examination that they had a land dispute with PW1's family.

59. I have considered this evidence and I have noted that the Appellant cross examined PW1 and PW2 about the existence of a family dispute or grudge and they denied the existence of such a dispute. The Appellant did not provide any evidence to suggest that he was being framed up or the existence of a land dispute between the two families.

60. Wesley Kibet Mutai (DW2) and Daniel Sang (DW3) testified that on 5th May 2021 the found PW1 screaming and asking the Appellant for assistance as she was being dragged by a motorcyclist. I have considered this evidence and I have noted that DW2 and DW3 testified to events that allegedly occurred on 5th May 2021 which was not the material day in this case. Upon cross examination, they confirmed that they were testifying to the events of 5th May 2021. This evidence in my opinion is immaterial and does not add any value to the Appellant's defence.

61. In totality, I find that the Appellant's defence as insufficient and it did not raise or cast a doubt on the Prosecution's case. It is my conviction that he was properly convicted.

iii. Whether the Sentence preferred against the Accused was manifestly excessive, harsh and severe.

62. In this case the penal section for a defilement case for a child of 15 years is provided by Section 8 (3) of the *Sexual Offences Act* which states that:-

> A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

63. The Accused was given a chance to mitigate and he stated that he was sickly and asked for a non-custodial sentence.

64. It is my finding that the 20-year sentence passed by the trial court was just and fair and that the Appellant deserved a deterrent sentence. There were aggravating circumstances in the commission of the offence where the Appellant caused bruises to PW1's neck in the ordeal and warned her of repeated defilement if she screamed.

65. In the final analysis, the Appeal has no merit and the same is dismissed. I uphold the conviction and the sentence of 20 years shall run from 31st May 2022 being the date of sentence in the trial court.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 27TH DAY OF SEPTEMBER, 2023.

.....

R. LAGAT-KORIR

JUDGE

Judgment delivered virtually in the presence of Mr. Njeru for the state, Appellant present virtually at Kericho Main Prison and Siele (Court Assistant)