Rutto v Republic (Criminal Appeal E029 of 2022) [2023] KEHC 24264 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24264 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E029 OF 2022

RB NGETICH, J

OCTOBER 25, 2023

BETWEEN

KIPCHIRCHIR RUTTO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal against both conviction and sentence arising from the Judgment by Hon. R. Koech (SPM) delivered on the 4th day of April, 2022 in Eldama Ravine S/O No. 036 of 2021))

JUDGMENT

1. The Appellant Kipchirchir Rutto was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual offences Act* No.3 of 2006. The particulars of the offence being that the Appellant on the 26th day of June, 2021 at around 1100hrs at [particulars withheld] village in Mogotio Sub- County within Baringo County intentionally and unlawfully caused his penis to penetrate the vagina of B.J a child aged 2 years.
2. The Appellant was also charged with an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual offences Act* No.3 of 2006, the particulars of the charge being that the accused on the 26th day of June, 2021 at around 1100hrs at [particulars withheld] village in Mogotio Sub- County within Baringo County intentionally and unlawfully caused his penis to come into contact with the vagina of B.J a child aged 2 years.
3. The Appellant denied both the main and alternative charge and the prosecution availed a total of 6 witnesses during the trial in support of their charge and upon hearing prosecution and defence case, the appellant was convicted and ordered to be detained at the President's pleasure under Section 167(1)(a) of the Criminal Procedure Code cap 75 Laws of Kenya.

4. The Appellant having been aggrieved and dissatisfied with the trial court's decision, appeals against the judgment on the following grounds:-

   i. That the learned trial magistrate erred in law and in fact by convicting the Appellant on harsh excessive and unconstitutional sentence of detention under presidential pleasure.

   ii. That the learned trial magistrate erred in law and in fact by failing to consider that the Appellant was psychiatric and was under medication and thus he was not competent to defend himself.

   iii. That the learned trial magistrate erred in law and in fact by failing to consider that the Appellant's health was paramount and that the prosecution might have taken advantage of his un defensive situation.

   iv. That the learned trial magistrate erred in law and in fact by convicting the Appellant on insufficient medical evidence that could not sustain such conviction and sentence.

   v. That the learned trial magistrate erred in law and in fact by admitting evidence of Pw 1 and Pw 2 which was conspired and false

   vi. That the learned trial magistrate erred in law and in fact by concluding that there was penetration and which solely relied on a broken hymen.

   vii. That the learned trial magistrate erred in law and in fact by failing to consider that there was no corroboration as a matter of law on the witnesses adduced by the prosecution as testified.

   viii. That the learned trial magistrate erred in law and in fact by failing to consider that the prosecution did not prove the case beyond reasonable doubt on the Appellant as per the presence of contradiction on the testimonies as served.

5. The appellant filed supplementary grounds of appeal under section 350(2) of the CPC and brings forth the following grounds: -

   i. That the ingredients of the offence were not conclusively proved as required by law.

   ii. That the learned trial magistrate erred in law and fact by conducting unfair trial since the appellant was psychiatric and was under medication and thus, he was not competent to defend himself.

   iii. That the learned trial magistrate erred in law and in fact by sentencing the Appellant to a sentence term that is not only harsh but also excessive in light of the facts and circumstances of this case contrary to Articles 25(a), 29(1)(c) and 50(2)(g)(h)(p)(q), 50(4) of *the Constitution*.

6. The Appellant urges this court to quash the conviction and the sentence and he be set aside and the Appellant be acquitted.

7. The appeal proceeded by way of written submissions and the ingredients of the offence of defilement as set out in the case of Dominic Kibet Mwareng v Republic [2013]eKLR were not conclusively proved; that the ingredient of penetration was not proved and that the learned trial magistrate relied on the evidence of Pw 3 who testified that he found the complainant crying and the Appellant having lowered his trousers, while the complainant was stripped naked and the Appellant rose up and left while pulling up his trousers when he saw Pw3.

8. The appellant argues that the mucus like substance that Pw3 claimed to have seen on the thighs of the complainant was not seen by Pw4 and Pw6 and it was not ascertained whether the mucus like

substance seen by Pw3 was the Appellant's spermatozoa or not and from evidence on record, there is no evidence showing/indicating that the complainant had been defiled earlier.

9. The appellant further submitted that it is on record that the complainant was taken to hospital for examination on the same day and upon examination of the complainant, it emerged that the hymen was missing. The appellant submits that even if the hymen was missing, there was no evidence showing that it was broken on the material day since no blood stains were detected to show that it was freshly broken; and Pw6 Doctor Yusuf in his evidence in chief testified that the whitish substance seen on the complainant resulted from an injection – and referred to the case of John Mutua Munyoki Vs Republic [2017] eKLR in support of his argument.

10. The appellant submits that the learned trial magistrate was in error when he found out that the Appellant was psychiatric but went ahead to find him guilty as charged yet he could not defend himself. He submitted that the law is not mute in a case where the court finds that an accused person cannot defend himself and submitted that the trial court acted contrary to provisions of Article 50(2)(g)(h) of *the Constitution* and Articles 14(3) (d) of the International Covenant on Civil and Political Rights by going on with trial after finding out that the appellant was not represented and the Appellant was prejudiced as evidenced in the trial court's proceedings that he could not cross examine the witnesses; the appellant cited that of Legal Aid Board v The State (363/09)[2010]ZASCA 112.

11. The appellant further submits that the order issued under Section 167(1)(a) of the Criminal Procedure code was unlawful and unconstitutional. He submits that section 167(1)(a) of the Criminal Procedure Code is contrary to Articles 27(1) and (2) of *the Constitution* which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law and equality includes the full and equal enjoyment of all rights and fundamental freedoms. That the undermentioned section of the law yields to denial, violation, infringement and threatening of the Petitioner's rights and fundamental freedoms. That it is impermissible to subject human beings including prisoners to differences in treatment that are inconsistent with *the constitution*.

12. The appellant submitted that the High court in Kisumu dealt with the impugned Section in Criminal Case No.6 of 2011 Republic v SOM [2018] eKLR and also in the case of Nairobi H.C Constitutional Petition No. 570 of 2015 AOO & Others v Attorney General & Another [2017] eKLR where the court dealt with an accused who was guilty but insane; he urged this court to find that the sentence meted out in the instant matter was unlawful and unsafe since it is not constitutional and acquit the Appellant

13. The Respondent filed written submissions and submitted that in respect to the argument that the sentence was harsh, excessive and unconstitutional, the Appellant was tried and found guilty but no conviction lay against him; that Appellant was tried in line with the provisions of Section 167(a) of the Criminal Procedure Act which provides that in cases tried by the subordinate court, the court shall proceed to hear the evidence and if at the close of the evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused but if the court is for the opinion that the evidence would justify a conviction, it shall order the accused to be detained during the president's pleasure; but even such order shall be subject to confirmation by the High Court and submits that the Appellant was properly sentenced in accordance with the provisions of the law.

14. on whether the medical evidence was sufficient to sustain a conviction, the respondent argues that Pw 6 the medical officer Dr. Yusuf Mahad of Bahati Level 4 Hospital examined the complainant and found that the Child's vagina and the hymen was missing and there was grievous harm based on the injuries sustained. The doctor formed the opinion that the child had been defiled and produced the P3 form as exhibit 1, the PRC Form for the child and Lab request as Exhibit 2a and 2b respectively; that there is

evidence on record which to great extent link the Appellant to the offence. Pw3 stated that she observed the condition of the complainant and that there is also evidence of the complainant's mother which corroborates the evidence of the medical officer hence there is sufficient medical evidence on record worth sustaining a conviction.

15. As to whether it is the appellant who defiled the child, PW3 testified that when she opened the door, she found the Appellant having removed his trouser half lying on the complainant who was his. Her evidence was corroborated by evidence of Pw4 Mercy Chepyegon Kiprop who examined the complainant's private parts and saw whitish substance on the thighs which looked like semen. She checked the child's vagina and it was wide open; on questioning the complainant, the complained told her that it is the Appellant who had defiled her. She took the child to the Hospital where she was treated and discharged. Examination by the doctor Pw6 Dr. Yusuf Mahad confirmed that the complainant was defiled. The complainant's evidence was corroborated by the evidence of Pw 3, Pw 4, the complainant and Pw 6 and hence the evidence of all prosecution witnesses was well corroborated to secure a conviction against the Appellant. The Respondent relies on the case of High Court of Kenya at Nyamira Criminal Appeal No. E015 of 2020 Boaz Nyanoti Samwel Vs Republic and Meru H.C Criminal Appeal No. E050 of 2021 Between Gabriel Mwongela Vs Republic in support of their case.

Analysis And Determination

16. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court t fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. For this, I give due allowance. The principles that apply in the first appellate court are set out in the case ofOkeno 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.)"

17. In view of the above, I have perused and considered evidence adduced before the trial court. I have also considered submissions by parties herein and find the following as issues for determination:-

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

ii. Whether the sentence meted on the Appellant was harsh, excessive and unconstitutional.

18. Section 8(1) of the *Sexual Offences Act* provides as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

> (3) 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.

(i) Whether ingredients or offence of defilement were proved

19. The three ingredients for the offence of defilement are proof of penetration, proof of age and identification of the assailant. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

20. Record show that PW3 opened the door and found the Appellant having removed his trouser half lying on the complainant. Her evidence was corroborated by evidence of Pw4 Mercy Chepyegon Kiprop who examined the complainant's private parts and saw whitish substance on the thighs which looked like semen. on questioning the complainant, the complained told her that it is the Appellant who had defiled her. She took the child to the Hospital where she was treated and discharged and examination by t Pw6 Dr. Yusuf Mahad of Bahati Level 4 Hospital confirmed that the complainant was defiled. The complainant's evidence was corroborated by the evidence of Pw 3, Pw 4 and Pw 6. There is no doubt that the complainant was defiled.

21. That aside, Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

22. On identification of assailant, pw3 red handedly found the appellant defiling the child; he was not a stranger as he used to work for complainant's parents as per evidence on record; the issue of mistaken identity cannot therefore arise.

23. In respect to age, the child's birth certificate was availed to ascertain her age. The birth certificate was not challenged by the appellant.

24. In view of the appellant's mental state as found by trial court, it is difficult to know whether he was in his lucid moments or not and finding of guilt is therefore founded on wrong principles. The trial court having found that appellant was insane, it will be erroneous to say he was blameworthy or he had guilty mind.

(ii) Whether the sentence meted on the Appellant was harsh, excessive and unconstitutional.

25. The appellant argued that the trial magistrate found that he was psychiatric but went ahead to find him guilty as charged yet he could not defend himself. That the law is not mute in the case where the

court finds that an accused person cannot defend himself. His argument is that the trial magistrate acted contrary to provisions of Article 50(2)(g)(h) of *the Constitution* and Articles 14(3) (d) of the International Covenant on Civil and Political Rights by going on with trail while the appellant was unrepresented yet the appellant could not examine the witnesses and cited the case of Legal Aid Board v The State (363/09) [2010] ZASCA 112.

26. The appellant further submits that Section 167(1)(a) of the Criminal Procedure code is unlawful and unconstitutional. He submits that section 167(1)(a) of the Criminal Procedure Code is contrary to Articles 27(1) and (2) of *the Constitution* which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law and that equality includes the full and equal enjoyment of all rights and fundamental freedoms. That the undermentioned section of the law yields to denial, violation, infringement and threatening of the Petitioner's rights and fundamental freedoms. That it is impermissible to subject human beings including prisoners to differences in treatment that are inconsistent with *the constitution*.

27. In view of the above, the appellant having been declared Psychiatric, indeterminate detention amounts to inhuman treatment, it would be appropriate for him to be treated and periodical reports be submitted to the court to enable court determine whether he is fit to join the society or he be dealt with otherwise.

28. Final Orders:

    1. Finding of guilt is quashed.

    2. Sentence set aside.

    3. Appellant committed to a Mental Institution. Mention on 15/4/2024.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET

THIS 25TH DAY OF OCTOBER 2023.

....

RACHEL NGETICH

JUDGE

In the presence of:

Mr. Elvis – Court Assistant.

Appellant present.

Ms Ratemo for State.