Ruto v Republic (Criminal Appeal 21 of 2019)
[2022] KEHC 11060 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11060 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL 21 OF 2019

CM KARIUKI, J

JULY 28, 2022

BETWEEN

SIMON KIPTOO RUTO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal from the original conviction and sentence by Hon S N Mwangi - Senior Resident Magistrate dated May 17, 2019 in Nyahururu Chief Magistrate Court S O A No 82 of 2018))

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8(4) *Sexual Offenses Act*,

2. The particulars being that on various dates between November 2017 and May 2018 at Ewaso Narok Location in Nyahururu Sub County of Laikipia County, intentionally and unlawfully caused his genital organs, namely penis, to penetrate the genital organs, namely vagina of GKS, a child aged 16 years.

3. The Accused denied the charge, and Prosecution called six witnesses to prove its case. The Accused tendered his defence, and the Court verdict was that the Appellant was guilty, convicted, and sentenced to serve 15 years.

4. Appellant was aggrieved and thus lodged an appeal and set out:

    I. That, the trial Magistrate erred in law and fact because the PW 1, the complainant, informed the Court that her father pressurized her to say that it was Kiptoo Ruto who defiled her out of her own will, whereby the Magistrate did not consider.

II. That the trial Magistrate erred in law and fact, bearing in mind PW 2 was the mother to the accused. She informed the Court that the accused used to visit their home for phone charging, but it does not mean if a neighbour comes to your house for a particular issue, it's the other way round.

III. That the trial Magistrate erred in law and fact because PW 3, the investigating officer, informed the trial court that he did not investigate the matter as required because the accused was handed over to him by the area Chief. The latter arrested the accused and persuaded him to accompany him to a police station to solve the issue of illegal grazing.

IV. That the trial Magistrate erred in law and fact as PW 5, the doctor informed the trial court that he only examined the complainant but not the accused and stated the complainant was 9(nine) weeks pregnant. Yet, the complainant's age was not confirmed for lack of official document, which is mandatory in a case of this magnitude.

V. The trial Magistrate erred in law and fact because the Prosecution did not prove the offence ever occurred with the accused, yet the following ingredients exist.

a. That there was penetration or

b. An indecent act was committed

c. Proof of identity of the penetrator

d. Proof of age of the complainant

e. The relationship between the complainant and the accused must be one of those listed under section 20 i.(1).

5. The parties were directed to canvass appeal in submissions.

6. Appellant's case and submissions

7. The appellant case is that the PW1, the complainant Grace Sianga testified on December 3, 2018 and January 4, 2019. The reason why she was stood down on December 3, 18 is as set out in the ruling on page 17 of the Record of Appeal in lines 6-13, where the trial Court stated as follows: -

> " The conduct of the complainant is wanting, for she keeps smiling despite being told this is a serious case and has refused to talk despite being asked several times by the state council and the court intervening. Pw1 is stood down until January 4, 2019"

8. The following are some of the excerpts of her evidence in Court before she was stood down:-

> " I went there, and he told me he wanted to have sex with me. I agreed, so we had sex like two people do. I took myself to his house (she laughs)".
>
> "I removed my clothes, i e, my panty (she smiles)."
>
> "I then laid down. He then laid on me (she laughs). Ruto laid on me as I faced upwards (she laughs)".
>
> "He had removed all his clothes as he laid on me. I then had with him. He also removed his trouser (she smiles) then he laid on me. Sex is bad manners. (she laughs).

9. At this stage, the complainant stood down on what the trial court deemed to have lacked seriousness. In her introductory evidence, the complainant had stated as follows:-

> " Ruto is my neighbor, and I had a sexual relationship with him. So he was my boyfriend. I continued to be in a relationship with him till July 2018 when I got pregnant".

10. Come January 4, 2019, when the PW1 was recalled, the narrative changed utterly, and she now testified that the Appellant used to force her for she could refuse to have sex with him, and he used to pull her into his bedroom by grabbing her by force and that they would struggle. She continued to state that every time they had sex, it was by force and that the Appellant used to warn her not to tell anyone or he would kill her.

11. The Appellant was acting in person, and as such, it is difficult to tell whether the evidence adduced on November 4, 2019 after the complainant had been stood down for giving what appeared to have been unfavorable evidence to the Prosecution was indeed contained in her police statement. But during cross-examination on page 21, line 21 of the Record of Appeal, she said, "It is not in my statement," which means the evidence she had given.

12. On cross-examination of the Court, she recanted her earlier evidence and said that "Ruto is not my boyfriend for he has four children. I never used to love him. We had sex very many times. " never used to love him for he would force me to have sex with him".

13. It is submitted that the trial court erred in allowing the Prosecution's application to stand down the witness for no good reasons even after the Appellant, who was acting in person, insisted that the matter proceeds.

14. The complainant was not a truthful person. Consequently, the complainant was prejudiced in the trial and denied a fair hearing. The trial magistrate out to have inquired from the court prosecutor whether the evidence that the complainant was giving tallied with her statement and, if not, proceeded to declare her a hostile witness so that the Prosecution could have moved to cross-examine her as per the contents of her statement instead of adjourning the case to allow coaching to take place.

15. Immediately after she was recalled on January 4, 2019, she started by stating as follows;

> " We did bad manners. He removed his thing for urinating and put it in my private part, vagina."

16. The die was cast. This was the only reason why PW1 was stood down, and the trial Court was partisan. Appellant cites the case of *India Rattiram V State of M P* 20124SCC 516, where the Judge bench ruled thus,

> " Fundamentally, a fair trial and impartial trial has a sacrosanct purpose. It was a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would ostracize injustice, prejudice, dishonesty, and favoritism."And again:-"Decidedly, there has to be a fair trial and no miscarriage of justice, and under no circumstances should prejudice be caused to the accused."

17. Also cited is the case of *Joseph Ndungu Kagiri V R* (2016)eKLR, where the Court held as follows:-

> "..... The trial should be reasonable, fair, transparent, and expeditious but must comply with the basic law. These are the fundamental canons of our criminal jurisprudence, and they are quite in conformity with the constitutional mandate contained in Article 50 of

the *constitution* of Kenya 2010. The right to a Fair Trial is one of the cornerstones of a just society."

18. It is submitted that the Appellant was denied a fair trial, and he should be acquitted.

19. Also, Appellant submits that although PW1 was said to be 16 years, she gave unsworn evidence after a *voire dire* was conducted. Although PW1 was not a child of tender age, and her evidence ought to have been subjected to an oath, he relies on the case of *Enock Ebwogo V R* (2021)eKLR.

20. The Appellant submits that he ought to be acquitted due to the lapse as mentioned earlier as was held in the case of Enock Ebwogo *supra* that:-the value of unsworn evidence, where it is taken from a witness who is not allowed in law to give such evidence was strictly not evidence. The rules of evidence could not be applied to it. Therefore, it was to be of no probative value but could not be used to it.

21. It was also submitted that the evidence that the Appellant defiled the complaint was also doubtful, noting that the defilement was alleged to have happened for one year. Still, she did not inform anyone until she was found pregnant. If the Appellant forced her into sex, why did she continue to visit his house after he threatened her with death?

22. The Appellant, in his defence, stated that the boy responsible for the complainant's pregnancy was known. Indeed, in cross-examining PW 1, he mentioned one Mwangi, and in re-examination that Mwangi was her friend and neighbour, and they would herd together in 2016. Also mentioned as pw1 friend was Muitui-

23. Thus submitted that DNA ought to have been produced to connect the Appellant to the alleged pregnancy, and no one witnessed the Appellant defiling the complainant.

24. The case before Court was the complainant's word against the Appellant's and the unsworn evidence of PW1 and not corroborated by independent evidence to confirm that indeed he had defiled her and made her pregnant as required in law.

25. Respondent's case and submission

26. It is not in dispute that the complainant was 16 years old at the time of the offence. However, as per Rule 4 of the *Sexual Offences Act (Rules of Court) 2014*, the Prosecution can rely on other documentary evidence such as a medical report and P3 form to prove the age of a complainant. Accordingly, the P3 form was produced as Exhibit 1. The doctor, in the P3, indicated that upon examination of the complainant, he assessed her age to be approximately 16 years.

27. The complainant's evidence clearly shows that penetration occurred between her and the Appellant on several occasions. For example, on page 18 of the appeal record, the complainant stated, "We did bad manners. He removed his thing for urinating and put it in my private part, my vagina. We had sex many times, but I can't recall the exact number. We used to have sex in his house but not all the time. If it weren't at his house, we would do it on the neighbour's farm".

28. Her evidence was corroborated by the doctor PW3, who produced the P3 form, exhibit 1. The doctor noted that the complainant was indeed defiled, and she was nine weeks and six days pregnant at the examination time.

29. There is no doubt that the Appellant was the one who defiled the complainant. She correctly identified the Appellant. She stated that the offence occurred between November 2017 and May 2018 when the Appellant would defile her in his house when his wife was away or on the neighbour's farm. The complainant and her mother knew the Appellant well before the offense's commission.

30. The Appellant states that he was denied a fair trial because the complainant gave unsworn evidence. However, It is submitted that was not the case because after the complainant gave her evidence, the Appellant was allowed to cross-examine her testimony, which is on record. Therefore, the Appellant was granted a fair trial and no miscarriage of justice.

31. The Appellant alleges that the complainant's evidence was doubtful because she sometimes smiled when giving her evidence. This is explained in that children may behave that way because victims of defilement experience trauma, negative emotions, and anxiety due to the defilement. The complainant's behaviour in Court was occasioned by the fact that she was giving evidence about a shameful act done to her. Furthermore, she was narrating this ordeal to total strangers.

Issues, Analysis, and D

After going through the evidence on record and parties' submissions, I find the issues are; whether the trial was irregular, unconstitutional, and prejudicial to the Appellant? If the above is negative, did the Prosecution prove its case beyond a reasonable doubt?

The duty of the first appellate Court is aptly stated in the case of *Kiilu & Another vs Republic* [2005]1 KLR 174. The Court of Appeal said thus;

> An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate Court's own decision on the evidence. The first appellate Court must weigh conflicting evidence and draw its conclusions.
>
> 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; 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."

32. From the onset, the first ground on whether the proceedings meet the threshold of a fair trial, one has to get the complainant's part of the testimony of the pw1, the victim of the alleged defilement. In the introductory part of pw1 testimony, the witness is quoted to have stated that;

> " Ruto is my neighbour, and I had a sexual relationship with him. So he was my boyfriend. I continued to be in a relationship with him till July 2018 when I got pregnant".
>
> She continued;
>
> "I went there, and he told me he wanted to have sex with me. I agreed, so we had sex like two people do. I took myself to his house (she laughs)"."I removed my clothes, i e, my panty (she smiles)."
>
> "I then laid down. He then laid on me (she laughs). Ruto laid on me as I faced upwards (she laughs)".
>
> "He had removed all his clothes as he laid on me. I then had with him. He also removed his trouser (she smiles) then he laid on me. Sex is bad manners. (she laughs).
>
> Then trial court made the following ruling in an adjourning the matter;
>
> "The conduct of the complainant is wanting, for she keeps smiling despite being told this is a serious case and has refused to talk despite being asked several times by the state council and the court intervening. Pw1 is stood down until 4/1/2019"

> Come 4/1/2019, when the PW1 was recalled, the narrative changed utterly, and she now testified that the Appellant used to force her for she could refuse to have sex with him, and he used to pull her into his bedroom by grabbing her by force and that they would struggle. She continued to state that every time they had sex, it was by force and that the Appellant used to warn her not to tell anyone or he would kill her.
>
> The Appellant was acting in person. As such, it is difficult to tell whether the evidence adduced on 4/11/2019 after the complainant had been stood down for giving what appeared to have been unfavorable evidence to the Prosecution was indeed contained in her police statement. But during cross-examination on page 21, line 21 of the Record of Appeal, she said, "It is not in my statement," which we take to mean the evidence she had given.
>
> On cross-examination of the Court, she recanted her earlier evidence and said that "Ruto is not my boyfriend for he has four children. I never used to love him. We had sex very many times. I never used to love him for he would force me to have sex with him".

33. Was the complainant coached after she was stood down on December 3, 2018 to give evidence that would incriminate the Appellant? For example, should a witness giving evidence unfavorable to the Prosecution be stood down?

34. It is the Appellant submissions that the trial court erred in allowing the Prosecution's application to stand down the witness for no good reasons, even after the Appellant, who was acting in person, insisted that the matter proceeds.

35. The complainant was not a truthful person. Consequently, the complainant was prejudiced in the trial and denied a fair hearing. The trial magistrate out to have inquired from the court prosecutor whether the evidence that the complainant was giving tallied with her statement and, if not, proceeded to declare her a hostile witness so that the Prosecution could have moved to cross-examine her as per the contents of her statement instead of adjourning the case to allow a possibility of coaching to take place.

36. In *Daniel Odhiambo Koyo v Republic* [2011] eKLR, the Court of Appeal stated the law on the probative value of the evidence of a refractory and hostile witness as follows:

> "... The law on such witnesses is clear. The probative value of his evidence is negligible. Nevertheless, it may be relied upon in clear cases to support the Prosecution or defence case. In *Maghenda v Republic* [1986] KLR 255 at P 257, this Court remarked thus regarding the evidence of a hostile witness:
>
> "The evidence of a hostile witness must be evaluated, particularly if it tends to favour the accused though the Court may not necessarily act upon it."

37. There is a thin line between a hostile and refractory witness. Both are people who display reluctance in giving evidence as required of them.

38. Usually, a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or his reluctance to testify...

39. The Court of Appeal also summarized the applicable law in *Abel Monari Nyanamba & 4 others v Republic* [1996] eKLR as follows: "In *Coles v Coles*, (1866) L R 1P &D 70, 71, Sir J P Wilde said:-

> " .....A hostile witness is one who, from how he gives evidence, shows that he is not desirous of telling the truth to the Court.'

40. In *Also v Republic* [1972] E A, on page 324, the predecessor of the Court of Appeal said:-

> " The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.'

Again in *Batala v Uganda* [1974] E A 402, the Court, on page 405, said:

> ".....Giving leave to treat a witness as hostile is equivalent to finding the witness unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight."

41. The evidence of a hostile witness is evident in the case, although generally of little value. No court could find a conviction solely on the evidence of a hostile witness because his unreliability must introduce an element of reasonable doubt...

42. The Prosecution submitted that after the complainant gave her evidence, the Appellant was allowed to cross-examine her on testimony tendered, which is on record. Therefore, the Appellant was granted a fair trial and no miscarriage of justice.

43. The said cross-examination did not cure the noted irregularities glaringly apparent on the face of the record as demonstrated by the proceedings availed to this Court.

44. The Court missed the step of conducting the trial once a witness started to diametrically change the fashions of her testimony. The matter was adjourned to another date to give the Prosecution a month to go and either couch their witness or mend their statement recorded by the witness.

45. It would have been fair to have a brief adjournment at an instant of prosecution application and, after hearing the accused, then convene Court for further hearing to enable the accused, who was unrepresented, to have a meaningful cross-examination.

46. The Court further allowed a 16-year-old witness to give unsworn testimony on the presumption that she was a child of tender age. However, in the case of *Maripett Loonkomok vs Republic* (2016) eKLR, the Court of appeal held that a child of tender age is under the class of age below 14 years. Further, that misstep in procedure rendered the proceedings fatally defective as the Pw1 was the star witness for the Prosecution as far as the allegation of defilement was concerned.

47. This is so because her evidence was of no probative value. In the case of *Enock Ebwogo V R* (2021) e KLR, the Court held;

> " The value of unsworn evidence, where it is taken from a witness who is not allowed in law to give such evidence" it was said in *May vs Republic* (1979) e KLR, by the Court of Appeal, that an unsworn statement was strictly not evidence and the rules of evidence could not be applied to it? It was to be of no probative value but could not be used to it. It was said to be no probative value but could be considered concerning the whole of the evidence. Its

potential was said to be persuasive rather than evidential, and for it to be of any value, it must be supported by the other evidence recorded in the case."

48. In the case of *Fatehali Manji vs Republic (1966) EA 343*, the Court held that retrial would be ordered only when the original trial was illegal or defective. In our instant matter, I have found the proceedings defective and prejudicial to the fair trial, thus a nullity. This is a fit case for retrial in line with the Court of the appeal decision. Therefore, the Court makes the orders that;

    i. The proceedings by the trial court impugned herein are hereby set aside.

    ii. The Appellant will be admitted to the bail terms which obtained during the impugned trial as he undergoes retrial, which will be conducted afresh by another court other than the Magistrate who handled the impugned trial herein.

DATED AND SIGNED AT NYAHURURU THIS 28TH DAY OF JULY 2022

.....

CHARLES KARIUKI

JUDGE