



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO 6 OF 2019

DAVID ODHIAMBO OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case

Number 20 of 2019 in the Senior Resident Magistrate's Court

at Maseno delivered by Hon R.S. Kipngeno (SRM) on 25th February 2019)

RULING

INTRODUCTION

1. The Appellant herein, David Odhiambo Ochieng, had been charged with the offence of defilement contrary to Section 8(1) (4) of the Sexual Offences Act No 3 of 2006. He had also been charged with the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was convicted for the offence of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act and sentenced to serve ten (10) years' imprisonment.
2. Being dissatisfied with the said judgment, on 25th February 2016, he lodged an appeal. He relied on six (6) grounds of appeal.
3. On 2nd December 2019, he filed a Notice of Motion application of even date in which he sought to be granted leave to call new evidence relating to MAN (hereinafter referred to as "the Complainant"), to be summoned to court on her present pregnancy (**sic**), which had a bearing on his conviction and sentence, the subject of the Appeal herein.
4. His application was supported by the Affidavit of his advocate, Andrew Ombwayo, that was sworn on the same date. Through his advocate, he stated that his mother had informed him that the Complainant was pregnant. He denied that he was responsible for the same.
5. The State did not respond to the said application. However, it filed its Written Submissions dated 13th February 2019 on 19th February 2020. The Appellant's Written Submissions were dated 28th January 2020 and filed on 29th January 2020.

LEGAL ANALYSIS

6. In his Written Submissions, the Appellant denied ever having been intimate with the Complainant and averred that he was framed for the alleged offence. He pointed that she had had a vaginal birth almost two (2) years prior to his conviction. He contended that she had never gone to see him in remand or prison and that she was engaged in intimacy with another person.
7. He relied on Section 358 (1) of the Criminal Procedure Code Cap 75 (Laws of Kenya) which provides that the test therein is that the evidence sought to be called must be evidence that was not available at trial, that the evidence was relevant to the issues and that it was credible in the sense that it was capable of belief. He placed reliance on the cases of **L.O. vs Republic [2019] eKLR** and **Republic vs Ali Babitu Kololo [2017] eKLR** in this regard.
8. He further submitted that the additional evidence that he had sought to be taken was to prove her state of mind and motives which was to frame him. He averred that it was in the interests of justice that the court allows his present application because he continued to be prejudiced yet the additional evidence was interlinked to his conviction and sentence which he had already appealed against.

9. On its part, the State also referred to Section 358 (1) of the Criminal Procedure Code and the case of **Elgood vs Regina [1968] EA at page 274** to argue that the Appellant had not met the required threshold as he had not demonstrated that he had new evidence that was not available at the time of trial or that the additional evidence was relevant to the matter before this court and was of interest or that the additional evidence would influence or impact the result of the verdict.

10. It added that he had not demonstrated that the additional evidence could not have been obtained with reasonable diligence for use at the time of trial or that it was not within his knowledge or could not have been produced at the time of the suit or petition. It therefore urged this court to dismiss the present application.

11. In his Judgment, the Learned Trial Magistrate had in fact observed as follows :-

“I believe that the parties had sex. The medical evidence failed to conclusively establish if penetration took place. In this respect, the main charge fails for want of proof to the required standard. I find however that the accused committed an indecent act with a child.”

12. The court carefully analysed the Appellant’s affidavit evidence and Written Submissions and noted that he was emphatic that he was not responsible for the Complainant’s pregnancy. However, it was not clear from his said pleadings what additional evidence he wished to be taken. What this court could discern, however, was that as at the time he filed his application on 2nd December 2019, the Complainant was already pregnant.

13. Bearing in mind that he had been charged with having defiled her on 25th day of April 2018 and/or alternatively committing an indecent act with her on 26th April 2018 and he was convicted on 25th February 2019, it was apparent that he could not have been responsible for her current pregnancy as normal gestation of a human being is nine (9) months from the date of conception. It was not therefore necessary for the court to grant him leave to prove an issue that was not contested.

14. Having said so, whereas the evidence he may have wished to rely upon may not have been available at the time of his trial as the Complainant got pregnant after he was charged, convicted and sentenced as aforesaid, he did not tell this court how the same would impact on his case or how relevant the same was to his conviction for the offence of committing an indecent act.

15. Indeed, an appellant must demonstrate to an appellate court that the evidence he wishes to be taken and adduced on appeal will change the outcome of the case in his favour. The facts of this case did not point to this having the case herein.

16. In the case of **James Mwamba Mwandoe vs Republic [2016] eKLR**, this very court allowed additional evidence to be taken by way of DNA samples being presented on appeal because there was a possibility of the outcome of DNA testing impacting on the verdict of the lower court therein which could lead to the acquittal of the appellant therein.

17. In that case, this court rendered itself as follows:-

“The final decision as to whether or not it ought to quash the conviction and set aside the sentence that was meted upon the Appellant by the Trial Court or whether it should affirm the conviction and sentence has been put on hold pending the DNA testing of the Appellant, PW 2 and the child who was allegedly said to have been born out of the said union.”

18. Notably, Section 358 (1) of the Criminal Procedure Code provides as follows:-

“In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.”

19. The objective of adducing that additional evidence was not to cast aspersions on the character of the Complainant who the Learned Trial Magistrate had already observed had been sexually active at her tender age but rather it was to assist this court in making determination on a relevant fact that was otherwise allegedly not presented before the trial court due to circumstances that were beyond the control of the appellant.

20. In the absence of any justification why the Appellant ought to adduce additional evidence, this court found and held that it was not necessary for it to order that additional evidence be taken for consideration on appeal for the reason that he had failed to demonstrate that the evidence he wished to rely upon was not available at the time of his trial, that such evidence was relevant to his Appeal herein or that it would favourably impact on his Appeal. The issue of the Complainant having been old enough to fabricate the case against him was one that could have been demonstrated during trial.

DISPOSITION

21. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Notice of Motion application dated and filed on 2nd December 2019 was not merited and the same be and is hereby dismissed.

22. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF MARCH 2021

J. KAMAU

JUDGE

In the presence of:-

Ombwayo for Appellant

Miss Gathu for State

Donera Amondi/ Mourine Okodoi– Court Clerk