REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO 22 OF 2020

AMOS KIPKORIR KURUI...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the original sentence of Hon Amboko, RM, dated 7th July 2020 in Criminal Case No 22 of 2019 in the Senior Principal Magistrate's Court at Kabarnet, Republic v Amos Kipkorir Kurui)

JUDGMENT

1. The appellant has appealed against his conviction and sentence of twenty years' imprisonment in respect of the offence of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2003.

2. In his amended petition to this court, the appellant has raised six grounds. Those grounds of appeal as framed by the appellant are as follows.

> *1. "That the learned magistrate erred both in law and fact by shifting the burden of prove (sic) to the appellant during judgement.*
>
> *2. That the learned magistrate erred both in law and fact by sentencing and convicting the appellant when the prosecution had not proved their case beyond any reasonable doubt.*
>
> *3. That the learned magistrate erred both in law and fact in convicting and sentencing the appellant based on numerous errors, inconsistencies and contradiction in the prosecution evidence.*
>
> *4. That the learned magistrate erred both in law and fact by holding that the prosecution has satisfied the ingredients of the offence of defilement.*
>
> *5. That the learned magistrate erred both in law and fact by failing to appreciate and correctly apply the law on the defence of alibi as raised by the appellant.*
>
> *6. That the learned magistrate erred in law by meting a manifestly harsh sentence to the appellant."*

3. For the sake of convenience, I will consider the fifth ground of appeal. In this ground the appellant has faulted the trial court for failing to appreciate and correctly apply the law in respect of considering the defence of alibi. In this regard, the trial court found the defence of the appellant unbelievable and a mere denial of the incident. In terms the trial court pronounced itself as follows*:*

> *"The accused person gave the defence of alibi, he stated that he was with one Collins Korir as a witness to confirm his whereabouts at the time of the incident. The accused person also contended that this case was brought about by a land dispute between his parents and Pw 2. The accused person never crossed examined Pw 2 with regard to the said land dispute. I find the accused person's defence unbelievable and a mere denial of the incident."*

4. Mr. Chepkilot, counsel for the appellant submitted that once an accused has raised the defence of alibi it is up to the prosecution to disprove it and that the accused does not assume the burden of proving it. Counsel further cited the provisions of section 309 Criminal Procedure Code (Cap 75) Laws of Kenya, and submitted that the prosecution should have used those provisions to call evidence in rebuttal to the defence of alibi that the appellant had set up. Counsel therefore submitted that the appellant was denied the opportunity to present his defence by being denied the opportunity to call the said Collins Korir as a defence witness.

5. In view of the immediate foregoing, the record of the proceedings shows that when the appellant was put on his defence in terms of section

210 of the Criminal Procedure Code, the appellant informed the court that he was going to give sworn evidence and was going to call one witness. That was on 4/3/2020. The appellant testified on 22/6/2020 and was cross examined. Thereafter he told the court that he tried to call Collins Korir (name of his witness) but was not available. He then applied and obtained an adjournment for one week to enable him get his witness.

6. During the resumed hearing the appellant told the court that his witness was not in court and he therefore closed his case.

7. Among the fair trial rights that an accused is granted is the right to call defence witnesses. This right is provided for in article 50 (2)(k) of the 2010 Constitution which reads as follows:

> "*(2) Every accused person has the right to a fair trial, which includes the right-*
>
> *(a)….*
>
> *(b)….*
>
> *(c)….*
>
> *(d)….*
>
> *(e)….*
>
> *(f)….*
>
> *(g)….*
>
> *(h)….*
>
> *(i)….*
>
> *(j)…..*
>
> *(k) to adduce and challenge evidence."*

8. In the instant appeal it is clear that the appellant was not represented by counsel during his trial. The appellant may not have known that the court had the power to summon Collins to attend court as a defence witness for he was not a lawyer. It was therefore the duty of the trial court as a guardian of the constitution; to have ensured that the compulsive machinery of the court should have been used to ensure that Collins (the defence witness) attended court as a defence witness. In other words, the trial court should have been proactive in the matter.

9. It therefore follows that the appellant had a defective trial.

10. In the circumstances, I agree with Mr. Chepkilot for the appellant that he was not accorded full facilities to adduce evidence in his defence.

11. In the premises, I find that the appeal of the appellant succeeds with the result that it is hereby allowed. The conviction and sentence of the appellant are hereby quashed.

12. In view of the foregoing, I find that it is moot or academic to consider the remaining grounds of appeal and I therefore decline to do so. For it is not the duty of this court to consider moot issues.

13. The only issue that falls for consideration is whether I should order a re-trial of the appellant before another court of competent jurisdiction pursuant to the powers vested in this court by section 354 (3) (a) (i) of the Criminal Procedure Code.

14. This court has to consider the period the appellant has been in custody and the seriousness of the offence as reflected by the penalty that is provided for. This court has also to consider whether the potentially admissible evidence might lead to a conviction of the offence charged.

15. I find that the appellant has been in both pre-trial custody and post judgment and sentence custody for a period about two years. The penalty provided for is 20 years imprisonment.

16. Furthermore, I find that the potentially admissible evidence Pw 1. Pw 2, Pw 3 and Pw 4 if believed might result in the conviction of the appellant: see *Braganza v Regina (1957) EA 152*.

17. After considering all of the foregoing matters, I find that the offence with which the appellant was charged and convicted was serious. I further find that the potentially admissible evidence if believed might result in the conviction of the appellant on a charge of defilement.

18. I therefore order that the appellant be re-tried before a magistrate of competent jurisdiction excluding the one who convicted and

sentenced him.

19. Furthermore, I order that the appellant be remanded in custody pending his production in the Senior Principal Magistrate's court for re-trial purposes as soon as practicable.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KABARNET THIS 29TH DAY OF SEPTEMBER 2021.

J M BWONWONG'A

JUDGE

In the Presence of:

Mr. Sitienei, Court Assistant.

Appellant present in person.

Mr. Mong'are for the Respondent.