



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO. 80 OF 2019

LAWRENCE MUASYA MUINDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case(S O) Number 2 of 2019 in the Senior Resident Magistrate's Court at Kangundo delivered by Hon M. Opanga (SRM) on 5.9.2019)

BETWEEN

REPUBLIC.....RESPONDENT

VERSUS

LAWRENCE MUASYA MUINDE.....APPELLANT

JUDGEMENT

1. The Appellant herein, **Lawrence Muasya Muinde**, was tried and convicted by Hon M. Opanga, Senior Resident Magistrate at Kangundo of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No 3 of 2006. He was also charged with the alternative charge of the offence of committing an indecent act with a child contrary to section 11(1) of the said Act.

2. He was sentenced to serve 15 years imprisonment for the offence of defilement. The learned trial magistrate made no finding on the alternative charge.

3. Being dissatisfied with the said conviction and sentence, the Appellant filed his Petition of Appeal and raised the following grounds of appeal as amended and summarized as follows:-

- a. THAT the trial magistrate erred by convicting him on inconsistent, insufficient as well as contradictory evidence.**
- b. THAT section 124 of the Evidence Act and section 19 of the Oaths and Statutory Declaration Act were not complied with.**
- c. THAT the sentence that was meted on the appellant was harsh and excessive.**
- d. That the prosecution case was not proven beyond reasonable doubt**
- e. That the trial court erred in dismissing the appellant's defence.**
- f. That the appellant's right to fair trial as per articles 50(2) (a) and 25(c) of the Constitution were violated.**

4. In support of the prosecution's case in the trial court, they relied on the evidence of 4 witnesses. **Pw1** was **FMM**; in the absence of a voir dire, it was directed that she be sworn in. She testified that she was a 13-year-old class 7 pupil who was born on 15.2.2005 as evidenced by

her birth certificate. It was her testimony that on 2.1.2019, she was on her way to her grandmother's home and met the appellant approaching from the opposite direction at about 3 pm. She recounted how the appellant beat her and forced her to accompany him to his house and upon arrival he shut the door, used a knife, took off his clothes, took off her skirt and jeans blouse and after hiding them he had sex with her the whole night. She told the court that on the 2nd day, he locked her inside his house and left her and on the 3rd day the police came to the house, and handcuffed the appellant; that she saw her mother who had fainted and also her father outside the house and she was taken to Kangundo police station and later Kangundo Level 4 Hospital. She testified that she did not get her pant and camisole from the appellant to date and that she informed her mother what had happened. On cross examination, she told the court that she did not see anyone else along the road when the appellant took her to his home.

5. Pw2 was AM, Pw1's mother who testified that on 2.1.2019, her children had gone to pick mangoes, however she noted that at 8 pm, Pw1 was not home and she assumed that she had gone to her grandmother. She discovered on the following day that Pw1 was not at her grandmother and when she enquired around, the appellant offered to help in the search for Pw1. On the 3rd day, according to her testimony, she resorted to a door to door search and the appellant's house was the 1st house to be searched; she stumbled upon Pw1 in the appellant's house with no clothes on and she fainted. It was then that the appellant was arrested and taken to the police post whereas she and Pw1 went to Kangundo Police station and then to hospital. She told the court that Pw1 informed her on how the appellant waylaid her when she was on her way to her grandmother's house and who tricked her into going to his house where he locked her, undressed her and defiled her; that the appellant locked her in the house for 2 days. She told the court on how Pw1 was found on the 3rd day; that a P3 form was issued to her as a result of the defilement, Pw1 got an infection. The P3 form, treatment notes and lab request form were marked for identification by the court.

6. Pw3 was Agnes Kioko who testified of the medical examination that was conducted on Pw1 by Dr Mbindyo. The witness testified that the victim was aged 13 years and with a history of defilement. According to the P3 form, Pw1 had no pant, her external genitalia had blood and was swollen; her hymen was freshly broken; urinalysis revealed the presence of pus cells. She produced the P3 form, treatment notes, lab request and lab report as exhibits. On cross-examination, she told the court that she did not examine the appellant.

7. Pw4 was CPL Modista Kashuri from Kangundo Police Station who testified that she was assigned to investigate the instant case. She told the court that the appellant was in custody and Pw1 had been taken to Hospital so she recorded statements where she established that the appellant waylaid Pw1 on 2.1.2019 and took her to his home, locked her in his house and defiled her then he hid her clothes. She established that Pw1 went missing for 3 days and a search party found Pw1 in the appellant's house with no clothes and that the clothes were recovered in the appellant's house. She told the court that on 6.1.2019, Pw1 identified her pant and camisole that were found in the appellant's house and the same were brought to court.

8. The court found that the appellant had a case to answer and he was put on his defence. He opted to give unsworn evidence. He testified that chickens went missing from his house and that on another day he saw police officers searching his house. He testified that the following day, Pw1 came to his house on the allegation that her father had chased her and he denied defiling Pw1. After considering mitigation, appellant was sentenced to 15 years imprisonment.

9. The appeal was canvassed vide written submissions.

10. The appellant submitted that the judgement of the trial court did not conform with section 169 of the CPC. It was pointed out to court that there was non-compliance with section 19 of the Oaths and Statutory Declarations Act. In placing reliance on the case of **Pandya v R (1957) EA 336**, it was submitted that the appellant created doubt in the prosecution case by raising an alibi.

11. On the issue of violation of article 50(2)(c) of the Constitution, the appellant submitted that the author of the P3 form did not give evidence hence a breach of section 77 of the Evidence Act. He relied on the case of **Donald Majiwa Achilwa v R (2009) eKLR** in submitting that Pw1's father was not called to testify. The appellant sought that he be acquitted.

12. Learned counsel Mr Mwongera for the respondent in submissions filed on 20.7.2020 opposed the appeal and framed two issues for determination. Firstly, whether the conviction was proper and secondly whether the sentence was proper.

13. On the first issue, counsel submitted that penetration was proven vide the medical evidence in the P3 form; age was established vide the birth certificate (Pexh 1). On the 2nd issue, it was submitted that the offence attracted a sentence of 20 years and that the trial court erred in passing a 15-year sentence; court was urged to enhance the sentence to 20 years.

14. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

15. Having looked at the submissions, the appeal and amended grounds of appeal as well as the evidence tendered, the following issues are necessary for determination namely: -

a. Whether or not the prosecution had proved its case beyond reasonable doubt.

b. Whether there were constitutional and procedural infractions and whether the same occasioned injustice to the appellant.

c. Whether there were contradictions in the evidence of the prosecution and whether the same could be cured by section 382

of the Criminal Procedure Code Act.

d. What orders may the court make?

16. On the issue of proof of the prosecution case, I shall combine the same with the aspect of contradictions. The Appellant submitted nothing in support of the ground that the prosecution case was riddled with contradictions. A perusal of the list of exhibits presented to the trial court showed a birth certificate as evidence of birth and which indicated the age of the complainant as 14 years.

17. With regard to evidence of penetration, court relied on the evidence of Pw1, as corroborated by Pw2 and Pw4 who were not eye witnesses and the medical evidence from Pw3. The said medical evidence was based on a P3 form. Pw3 testified that the complainant had vaginal injuries, and the same resonate with the circumstances that the complainant gave as well as how she was found at the appellant's house. When I look at the evidence in totality, I do confirm that there was penetration and it was caused by a male organ and that the appellant had an opportunity to meet Pw1 and therefore defile her.

18. The appellant has assailed the trial court for failing to consider the defence of alibi. His alibi did not shake the evidence of the prosecution and hence this ground of appeal must fail.

19. In addressing the question as to whether or not the prosecution proved its case to the required standard, being proof beyond reasonable doubt, I find that the evidence on record is satisfactory to convince this court that the appellant is the perpetrator of the offence. The complainant fingered him out as the assailant and that the complainant was found inside the appellant's house while stark naked and the appellant himself availed her clothes from where he had hidden them. The evidence of the complainant and the doctor established that there was penetration.

20. On the issue of procedural and constitutional infractions and their effect, I note that there was no voir dire that was conducted on the victim and there was no application by the prosecution to tender the medical report under section 77 of the Evidence Act. Because of the infraction in taking the evidence, this court ought to consider whether to grant a retrial. The issue of conducting a voir dire examination on witnesses of tender years is mandatory as required by section 19 of the Oaths and Statutory Declarations Act so as to enable a trial court to establish whether the said witness understands the meaning of an oath and also whether the witness is possessed with sufficient intelligence to justify the reception of his or her evidence. A voir dire is also in tandem with the provisions of section 151 of the Criminal Procedure Code that requires that evidence be given on oath.

21. As was stated in the case of **Ahmed Ali Dharmisi Sumar vs Republic 1964 E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343:-**

“In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

23. The Court of Appeal in the case of **Mwangi vs. Republic [1983] KLR 522** held as follows;

“...several factors have therefore to be considered. These include:

- 1. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.**
- 2. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.**
- 3. A retrial should not be ordered where it is likely to cause an injustice to the accused person.**
- 4. A retrial should be ordered where the interest of justice so demand.**

Each case should be decided on its own merits.”

24. I am satisfied that the prosecution evidence would sustain a conviction, however because of the infraction on the taking of evidence Pw1 and Pw3, I find an order for retrial is merited in the circumstances. The appellant will not suffer prejudice as he has barely served a fraction of the sentence. The prosecution is also able to avail their witnesses without a hitch.

25. On the ground of severity of sentence raised by the appellant, the principles upon which an appellate court will act in exercising discretion to review, alter or set aside a sentence imposed by the trial court were observed in the case of **Ogolla & s/o Owuor v Republic [1954] EACA 270** where the court stated:

“The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in JAMES Vs. REPUBLIC [1950] EACA pg 147, it is evident that the judge has acted upon wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.”

26. Similarly, Section 382 of the Criminal Procedure Code Act provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

27. I agree with the submission by counsel for the state and find irregularity occasioned by the trial court in passing the sentence contrary to the provision of section 8(3) of the Sexual Offences Act as the same provided for a sentence of twenty years’ imprisonment.

28. In the result the appeal succeeds. The conviction is quashed and sentence set aside and is substituted with an order for a retrial. The appellant is hereby ordered to be presented before the Hon Senior Principal Magistrate Kangundo law courts on the 1.10.2020 for the purposes of retrial.

It is so ordered.

Dated and delivered at Machakos this 30th day of September, 2020.

D. K. Kemei

Judge