Luvonga alias Baba Dorine & another v Republic (Criminal Appeal 4 of 2023) [2024] KEHC 3034 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3034 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDAMA RAVINE

CRIMINAL APPEAL 4 OF 2023

RB NGETICH, J

MARCH 14, 2024

BETWEEN

MOSES IMBUSI LUVONGA ALIAS BABA DORINE .... 1ST APPELLANT

JOHN MUSUNGU LUVONGA .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal against both conviction and sentence arising from the Judgement by Hon. R. Koech (SPM) delivered on the 12th April,2023 in Eldama Ravine Magistrate's Court S/O No. E056 OF 2021))

JUDGMENT

1. The Appellants were jointly charged with two counts of defilement in count 1 with the offence of defilement in the view of a child contrary to section 7 of the *Sexual offences Act* No. 3 of 2006. The particulars of the charge were that on the 19th day of November, 2021 at around 1800Hrs within Baringo County the accused persons jointly and intentionally caused their penises to penetrate the vagina of F.J and S.J respectively, children aged 9 years within the view of C.J a child aged 6 years.

2. In count II the 1st Appellant 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 were that on the 19th day of November, 2021 at around 1800Hrs within Baringo County the 1st accused intentionally and unlawfully caused his penis to penetrate the vagina of F.J a child aged 9 years.

3. Alternative to count II is the charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that the accused on the 19th day of November, 2021 at around 1800Hrs within Baringo County willfully and unlawfully committed an act which caused his penis to come into contact with the vagina of F.J a child aged 9 years.

4. The 2nd Appellant was charged in Count III 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 were that the accused on the 19th day of November, 2021 at around 1800Hrs within Baringo County intentionally and unlawfully caused his penis to penetrate the vagina of S.J a child aged 9 years.

5. Alternative to count III is the offence of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that the accused on the 19th day of November, 2021 at around 1800Hrs within Baringo County willfully and unlawfully committed an act which caused his penis to come into contact with the vagina of S.J a child aged 9 years.

6. The Appellants denied the charges and the prosecution availed 8 witnesses to prove charges against the appellants herein. Upon hearing, both Appellant were found guilty and jointly convicted of count I. The 1st appellant and the 2nd Appellant were separately found guilty and convicted of Count II and III respectively. on the 26th day of April, 2023 the trial court sentenced each accused person to serve sentence of Imprisonment for 10 years in count I. For count II, the 1st Appellant was sentenced Life Imprisonment and 2nd Appellant was sentenced to serve life imprisonment for count III. The court ordered the sentences to run concurrently.

7. The Appellants having been aggrieved and dissatisfied with the trial court's decision, filed appeal against the judgment vide Eldama Ravine High Court Criminal Appeal No. 4 of 2023 and Eldama Ravine Criminal Appeal No. 9 of 2023 respectively on the following grounds:-

   i. THAT the learned trial magistrate erred in law and fact by convicting the appellants on doctored evidence.

   ii. THAT the learned trial magistrate erred in law and fact by convicting the Appellant on insufficient medical evidence that could not sustain any conviction and sentence i.e. medical documents had no stamp from any Hospital and other parts was not duly signed by the medical officer.

   iii. THAT trial magistrate erred in law and fact by failing to appreciate that the prosecution evidence was marred with contradiction which greatly violated the credibility of the prosecution evidence.

   iv. THAT the learned trial magistrate erred in law and fact by failing to appreciate that the investigating officer's evidence was marred with contradiction by not proving beyond reasonable doubt his/her witness.

   v. THAT the learned trial magistrate erred in law and in fact by concluding penetration was proved solely relying on the broken hymen.

   vi. That the learned trial magistrate erred in law and in facts by finding that the prosecution evidence to be quite overwhelming notwithstanding the glaring contradiction between prosecution witnesses.

   vii. That the learned trial magistrate erred in law and in fact by convicting the Appellant on the strength of the prosecution case which was evidently full of glaring gaps.

   viii. That the learned trial magistrate erred in law and in facts by failing to appreciate that the nature of the appellants arrest was consistent with innocence.

8. The appellants prays for the total success of this Appeal, conviction quashed, sentence set aside and the Appellant set at liberty.

9. The Respondent made an application on the 18th day of October,2023 that the two files be consolidated where then the court ordered that the files be consolidated with High Court Criminal Appeal No. 4 being the lead file.

APPELLANT'S SUBMISSIONS

10. The appeal proceeded by way of both written and oral submissions. The 1st Appellant filed amended grounds of appeal together with the submissions as follows: -

    i. That the learned trial magistrate erred in matters of law and facts during the trial of this case when he relied on the medical evidence which was not proved at all.

    ii. That the learned trial magistrate erred in matters of law and facts during the trial of this case when he failed to note that the charge sheet of the case had lot of errors.

    iii. That the learned trial magistrate erred in law and facts during the trial of the case when he put more reliance on the evidence adduced by the 3 witnesses which was so contradicting according to the trial record.

    iv. That the learned trial magistrate erred in matters of law and facts during the trial of this case when he failed to note that some of the vital witnesses were not called to clear the doubt of the case.

    v. That the learned trial magistrate erred in law and facts during the trial of the case when he rejects my defense without cogent reasons why my defense was unacceptable.

11. The 1st Appellant urged this Honourable court to note that all the evidence adduced during the trial concerning the medical report was not proved properly because the minors were taken to the hospital after 3 days.

12. He submits that duration of 4 days cannot help the court to find exact outcome and urged the court to consider whether a child aged 9 years and 6 years can able to walk 27 kilometers after being defiled and submit that the allegations were a frame up due to the grudge arising from a phone which was stolen from his house and at page 62 line 22-23 confirms the beginning of the case.

13. Further at page 41 line 7-9 the father of the minor said he did not believe some of the evidence adduced. He urged this court to set aside all the evidence adduced by the three complainants and set the appellant at liberty; further that the charge sheet in this case the O.B No. shows the time report was made not the time he was arrested and they were arrested after 27 days yet no one told the court that after incident they were at large. He places reliance in the case of SULEIMAN JUMA ALIAS TOM VS REP CR APP. No. 181/2002 K.C.A AT {MBS}.

14. The 1st Appellant further submit that the prosecution relied on the evidence of the relatives and no other independent witness. He further submits that in his defence, he narrated very clearly what happened and the reason the case was brought to court is because of a difference over his phone but the trial magistrate did not consider his defence.

15. The 2nd Appellant filed amended grounds of appeal together with the submissions. He raises the following grounds: -

    i. That the learned trial magistrate erred in law and facts during the trial of this case when he failed to note that some of the vital witnesses in this case did not testify to prove the doubt e.g. chief of the area.

ii. That the learned trial magistrate erred in law and facts during the trial of this case when he put more reliance on the evidence of the minor who gave the court the evidence of lying concerning the incidence.

iii. That the learned trial magistrate erred in matters of law and facts during the trial of this case also when he relied on the medical evidence during the trial.

iv. That the learned trial magistrate erred in matters of law and facts during the trial of this case when he failed to note that the charge sheet of this case had a lot of errors according to this trial record.

v. That the learned trial magistrate erred in law and facts during the trial of this case when he rejected the Appellant's defense evidence without cogent reasons why my defense was not acceptable.

16. The 2nd appellant prays for the total success of the appeal, conviction and sentence quashed and sentence imposed set aside and the appellant set me at liberty.

17. The 2nd Appellant filed written submissions and urges this Hon. court to note that all the evidence adduced during the trial of this case was total lies according to this trial record.

18. That after the whole trial of this case, he was sentenced to suffer life sentence in jail and 10 years imprisonment. He submits that the charge sheet was not clear to the required standard, prosecution did not note that even the first report was made and the time appellant was arrested is so different.

19. That the trial magistrate did not note that some of the vital witnesses did not testify to prove the allegations and the trial record shows that chief of the area had those children for more than one hour according to the trial record and the distance the children walked from where they were up to their grandmother's place is almost 27 kilometers which is very far for a child of age 9 to 6 years to walk by foot and if the chief is the one who escorted the three children up to their grandmother's home, it shows that he knew what happened to those children and why they went to the grandmother. He added that the chief knew the parent of the children very well but the big question is whether he/she knew why the children travelled for 27 kilometers. He cited the case of Mohammed Bin Alui 1942E.A CA 72 and Again in the case of Rapkishan Padya VS Rep 1957 E.A 1R 339.

20. He further submitted that pw3 lied as there is no way Accused 1 and 2 had a chance to defile PWl and PW2 within the view of the Pw 3.and if PW3 who is a minor was crying, people could have heard her. He added that there is no way a child aged 9 years can be defiled and get energy to walk for 27 kilometers immediately. He submitted that the doctor did not implicate the two appellants with the incident and the Appellants were arrested after 20 days and questioned why it took long for them to be arrested if it is true that they are the ones who defiled those children.

RESPONDENT'S SUBMISSIONS

21. Ms Ratemo appearing for the Respondent submitted that the state did prove its case against both appellants. In count 1 both accused persons are jointly charged with jointly committing offence particularized in count 2 and 3 in the view of girl aged 6 years who was the younger sister of complainant in count 2 and 3. In count two and three, accused 1 and Accused 2 were each charged separately with defilement of a girl. The two girls were twins aged 9 years. The 3 girls were all aged below 11 years.

22. she submitted that the age of the minors was proved by producing birth certificates (Exhibits 2a and b) and penetration was proved by two P3 Forms produced, PRC Form was also produced together

with the medical treatment forms. She submitted that the prosecution sufficiently proved that the 2 minors were defiled.

23. On the issue of identification, she submitted that the 1st minor referred to as S.J aged 9 years clearly identified the appellants; she narrated that she was defiled in a home under construction near a mango tree. She said her hands and mouth were tied behind to a tree by the 2nd Appellant. She testified that the 2nd minor was also tied by the 1st Appellant and that she properly identified the 1st and the 2nd Appellants; she said the 2nd appellant wore a condom and after the incident, the assailants left them and ran away.

24. She submitted that the 2nd minor referred to as F.J also gave a narration of what happened; she explained the meaning of being raped to the court. She explained that she felt pain and was bleeding and she indicated Baba Dorine defiled her and pointed at him. That she identified the 1st appellant as the person who defiled her. She submits that both appellants in this case were identified by the two minors.

25. On whether the sentence was within the parameters of the law, prosecution counsel submitted that the evidence adduced was sufficient to impose life sentence for defilement of children under the age of 11 years. She further submitted that she is aware the Court of appeal declared life sentence as unconstitutional but the court ought to uphold the life sentence in this case arguing that the two minors will be traumatized for life since they were defiled at the same time which is something children are not supposed to witness. She urged the court to uphold the sentence.

ANALYSIS AND DETERMINATION

26. This is the first appellate court and the duty of the first appellate court was well set out in the case Okeno Vs. Republic [1972] E.A 32 as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Rulwala Vs. Republic [1957] E.A. 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."

27. Also, in the case of Mark Oiruri Mose –Vs- Republic [2013] e KLR Criminal Appeal No.295 of 2012 the Court of Appeal stated:

> " It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."

28. In view of the above, I have perused the petition of appeal, the record of appeal and the rival submissions by the parties and it comes out clearly that the issues for determination in this matter are as follows: -

i. Whether the charges facing the appellants was proved beyond reasonable doubt.

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

29. The Appellants were jointly charged in count 1 of jointly and intentionally causing their penises to penetrate the vagina of F.J and S.J respectively, children aged 9 years within the view of C.J a child aged 6 years. To proof this charge, one has to establish that the offence took place in full view of a minor. PW 1 and PW 2 testified that they were defiled in presence of C.J who also testified as PW 3. PW 3 (C.J) testified that her sisters were defiled in her presence while tied to mango tree and defiled. She said she saw what happened. She said she went aside and cried and when the Appellants fled, she untied her sisters. Her evidence was not shaken by appellant's defence. The charge was therefore proved beyond reasonable doubt.

30. In respect to defilement the prosecution is require to prove penetration, the age of the minor and the identity of the assailant (See C.W.K v Republic [2015] eKLR).

(a) Penetration

31. 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."

32. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.

33. In regards to Count II, PW 2 one F.J testified that she is aged 9 years old. She stated that Baba Dorine closed her mouth and did bad manners to her. She stated that she was with PW1 and Kossy sitting down under a mango tree when Mzungu and Baba Dorine went to where they were and asked Kossy to go aside. She stated that they normally see Mzungu and Baba Dorine at Tolmo where they use to go to school. She said at the time they arrived the 3 minors were eating bread and the appellants covered their mouths with papers from bread they were eating, tied behind her back using a rope and tied S.J also. She said their legs were tied apart and appellants did bad manners to them. She said it was Baba Dorine A1 herein who did bad manners to her while Mzungu A2 did bad manners to S.J. She said she felt a lot of pain and blood came out from where she urinates. She stated that F.J did not bleed like her. She said after that Mzungu and Baba Dorine put on their clothes and fled. She confirmed that it was Kossy who untied their hands. She said they informed their mother the next day what had happened and they were taken to the police station and to hospital.

34. PW 3 one Cynthia Jepkosgei testified that F.J and C.J are her sisters and that she knew Mzungu and Baba Dorine. She said she was present when the two appellants did bad manners to her sisters. She said Accused 1 did bad manners to F.J while Accused 2 did bad manners to S.J and the incident took place after the sun had set. PW 1 and pw3 corroborated the evidence of pw2 F.J who was defiled by 1st appellant.

35. In respect to Count III, the 2nd Appellant S.J testified as PW 1 and stated she knew both Mzungu (A2) and Baba Dorine (A 1) whom they lived together in the same plot. She confirmed pw2 and pw3 were her sisters. She confirmed the two appellants found them under a tree eating bread and tied her on the hands backwards to a tree. She said her sister pw2 was defiled by Baba Dorine. She said mzungu (A2)

wore a condom on his thing that he uses to urinate, removed his trousers and did bad manners to her. She said A2 touched the place where she urinates with his hands and she felt pain. She stated that Baba Dorine had tied C.J and did bad manners to her.

36. The evidence of S. J was corroborated with that of F. J and Cynthia Jepkosgei who adduced consistent evidence that Msungu who defiled S.J. Pw 7 Dr. Kibet Kimweu a doctor attached at ERSCRH examined pw2 and pw1 and found that their valves were bruised and swollen and their hymen were torn. He said that he examined them 4 days after the incident and laboratory results of samples examined showed signs of infection but no spermatozoa were found. He further said there were semen of live sperms and there were spermatozoa cells. He administered antibiotics and PEP drugs.

37. He formed opinion that each of the two girls had penetrative sex. He produced p3 for each of them in court. From the foregoing, I find that there was corroborative and consistent evidence adduced by the 3 girls pw1, pw2 and pw3 and the doctor pw7 to prove penetration.

(b) Proof of age of minors

38. The second ingredient of the offence of defilement is proof of age of the victim. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

39. Both PW 1 and PW 2 testified that they were aged 9 years old. PW 4 one Caroline Jepkoech Amisi the mother of the victims testified that F.J and S.J are twins and were both aged 9 years old. She showed birth certificates as PMFI 2a and b for the two minors to confirm age. PW 8 one No. 229900 C.P.L Keith Wafula produced the certificates of birth as Pexh 2(a) and (b) respectively. There is therefore no doubt that the two minors were 9 years old.

(c) Proof of identity of assailant

40. PW1's testimony is that she has known the two accused persons as Mzungu and Baba Dorine and that they live in Kemelei Plot where they lived. She stated that Mzungu did bad manners to her while Baba Dorine did manners to PW 2. She said they were also seeing the two at Kemelei. PW 3 one Cynthia Jepkosgei also said knew Mzungu and Baba Dorine.

41. From the foregoing, it is clear that the Appellants were not strangers to the victim having been neighbors and they even knew their names. The third ingredient was therefore proved.

42. On ground that the evidence adduced was contradictory, it is a settled principle of law that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

43. Having re-evaluated evidence on record, I do not see any substantial contradictions to warrant interference with the finding of the trial court. From the foregoing I find that the charges against the two appellants were proved beyond reasonable doubt.

(ii) Whether sentence imposed was harsh and excessive.

44. On whether the sentence meted on the appellants by the trial court was excessive, it is trite law that this court can only exercise supervisory jurisdiction over subordinate courts. The enabling law for revision is Article 165(6) and (7) of *the Constitution* and section 362 as read together with section 364 of the Criminal Procedure Code.

45. The revisionary jurisdiction of this court is wide in scope but it is limited to the parameters set out under section 362 of the Criminal Procedure Code which states as follows:

> "The High Court may call for and examine the record of any criminal proceedings before any Subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate Court."

46. In my view, section 362 should be read together with section 364 of the Criminal Procedure Code which specifies the orders the court can make, in its discretion, if it is satisfied that there was an illegality, error, irregularity or impropriety in the impugned proceedings, sentence or order issued by the trial court. The provision empowers the court to exercise any of the powers conferred on it as an appellate court by Sections 354, 357 and 358 of the Criminal Procedure Code if what is impugned is a conviction and if it is any other order except an order of acquittal, the court can alter or reverse the order challenged on revision with the aim of aligning it to the applicable law.

47. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. In the case of Shadrack Kipchoge Kogo vs. Republic Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows;

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

48. The Appellants were each sentenced to 10 years imprisonment for Count 1. In respect to Count II and Count III the 1st appellant and 2nd appellant was each sentenced to life imprisonment in their respective counts. I take note of the fact that there has been change of jurisprudence in respect to life imprisonment brought about by decision in Malindi Court of Appeal Criminal Appeal No. 12 of 2021, Julius Kitsao Manyeso Versus Republic where the court of appeal declared life imprisonment unconstitutional. I have carefully considered the facts of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating and aggravating factors, and the fact that the incident will traumatize the two minors for the rest of their lifetimes.

49. I am however of the view that appellants in view of change in jurisprudent in respect to life sentence, life sentence having declared unconstitutional, the appellants deserves determinate sentence. Taking into consideration the age of the minors and circumstances of the offence, I am inclined to impose impose 30 years imprisonment each against A1 and A2 in count 2 and 3 respectively.

PARA 50.

FINAL ORDERS: -

1. Appeal on conviction for each of the 3 counts is hereby dismissed

2. Appeal in respect to count 1 is hereby dismissed.

3. Life sentence in respect to count 2 and 3 are set aside.

4. Accused 1 and 2 to serve 30 imprisonment for count 2 and 3 respectively.

Judgment delivered, dated and signed Virtually at **Kabarnet**

This **14th** Day of **March** 2024.

……………………………………

RACHEL NGETICH

JUDGE

In the presence of:

Accused 1 present.

Accused 2 present.

Ms Ratemo for State.

Karanja, Court Assistant.

Page **9** of **9**

Judgment