



REPUBLIC OF KENYA



**Lagat v Republic (Criminal Appeal 17 of 2020)
[2024] KEHC 2075 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2075 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 17 OF 2020
JRA WANANDA, J
MARCH 1, 2024**

BETWEEN

ABEL KIPROTICH LAGAT APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Appellant was charged in Eldoret Chief Magistrate’s Court Criminal (Sexual Offence) Case No. 181 of 2018 with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 23/08/2018, he defiled a 12 years old class 6 primary school pupil (complainant). He also faced the alternative charge of committing an indecent act with the child.
2. By the Judgment delivered on 5/02/2020, the Appellant was convicted of the main charge of defilement and was then sentenced to serve a prison term of 20 years. Dissatisfied with the decision, he filed this Appeal on 10/02/2020.
3. The Appellant has now approached this Court vide the Notice of Motion dated 02/03/2023 filed through Messrs Seneti & Oburu Associates Advocates. The Application seeks the following orders:
 - i. [.....] Spent
 - ii. That the Appellant be granted leave to adduce further evidence which was not available during the hearing of the main case.
 - iii. Any other reliefs that the Court may deem fit and necessary.
4. The Application is brought under Article 47, 48, 49, 50 and 159(2) of the *Constitution*, Section 356, 358 and 364 of the *Criminal Procedure Code* and “all other enabling provisions of the law”. The



Application is supported by the grounds stated on the face thereof and the Affidavit sworn by the Appellant.

5. In the Affidavit, the Applicant deponed that this Appeal has an overwhelming chance and/or probability of success, that he has a right to adduce new/fresh evidence at the appellate Court which evidence was not within his knowledge during trial, that if he is allowed to adduce the fresh/new evidence, it will make a significant impact in the Appeal, that in the month of January 2023, he was approached by the complainant (minor, now adult), driven by her guilty conscience that she wished to confess that she lied to the trial Court about her age and about the fact that the Appellant defiled her, that the complainant narrated to him how her age was lowered to befit the circumstances of the case and that fearing the wrath of her father, she lied about the Appellant defiling her in order to protect her real boyfriend with whom she had had several sexual encounters, that the complainant wishes to adduce this crucial evidence through an Affidavit which will greatly impact on the trajectory of this Appeal, and that this evidence was not in his knowledge during the trial, having and has only come to his knowledge afterwards.

Replying Affidavit

6. Through the Replying Affidavit sworn by Senior Prosecution Counsel Emma Okok and filed on 14/04/2023, the State opposed the Application. Counsel deponed that the Appellant has not provided the new evidence that he wishes to adduce during the hearing of the appeal, that there is no provision in law that allows a complainant to recant her evidence at the appeal stage, that the complainant testified as PW2 and was categorical, during cross-examination, that she was not coached on what to say, that the evidence of the complainant was well corroborated by the evidence of PW3 who was present when the Appellant defiled the complainant, that the complainant's age was conclusively proved by way of an immunization/clinic card which was produced as an exhibit, that the Appellant was placed at the scene of crime by the complainant and PW3 and he was also well known to both PW2 and PW3, that the evidence on identification was therefore solid and the same cannot be dislodged by a purported Affidavit aimed at rebutting the Prosecution's case, that the Appellant was properly convicted since the trial Magistrate properly exercised his discretion in sentencing the Appellant and that the fact that an appeal is arguable does not automatically mean that the same will be allowed..

Court attendance on 12/06/2023 and 12/07/2023

7. On 12/06/2023, long after the parties had already filed and exchanged their Affidavits, directions given on filing of Submissions and after the Respondent had already filed its Submissions, Mr. Ayieko, Counsel for the Appellant, having even come late to Court after this matter had already been called out, sought leave to file a Further Affidavit. Despite opposition by Ms. Okok, I very reluctantly, in the interest of justice, gave such leave but strongly admonished Mr. Ayieko. I cautioned him that in future, such conduct would not be tolerated.
8. Despite my warning, Counsel for the Appellant was again at it on 12/07/2023. This is because although I gave him 14 days to file the Further Affidavit, he filed the same on 12/07/2023 (the same morning of the Mention), more than 2 weeks after expiry of the timeline given. He conceded that he had filed the Affidavit way out of time but profusely pleaded with the Court to admit the same. He stated that once the Further Affidavit is admitted, he would not file any written Submissions thereafter.
9. Again, in the interest of justice, I very reluctantly admitted the Affidavit but gave the Respondent leave to file a Supplementary Replying Affidavit in response. Since the Respondent had already filed written Submissions by that time, I also gave it leave to file Supplementary Submissions.



Appellant’s Further Affidavit

10. In the Further Affidavit, the Appellant reiterated that he was approached by the complainant with the intention to recant her evidence and testimony against the Appellant, and that the complainant misled the Court about the incident and her age. He then stated that he had attached the annexure marked “ABK 1”, is a sworn Affidavit.
11. Although the Appellant alleged that he had annexed the Affidavit (said to have been sworn by the complainant) as an exhibit “ABK 1”, the truth of the matter is that the same was filed unprocedurally as a totally independent and separate Affidavit of its own and “sneaked” into the Court file. This was against procedure but, yet again, in the interest of justice, and despite strong opposition from Ms. Okok, I admitted the Affidavit sworn by the complainant.
12. In the Affidavit said to be sworn by the complainant, it is deponent that the same had been sworn in support of the complainant’s decision to recant her evidence based on her Christian faith, conscious and the urge to tell the truth on what transpired since back then she was a minor and had no say over the matter, that she approached the Appellant at the prison because of her guilty conscious and the desire to seek forgiveness now that she is of age and informed the Appellant that she misled the Court about her age and the occurrences of the alleged fateful day of 23/08/2018, that the Appellant did not defile her as alleged since she had another boyfriend who even impregnated her, and that she now prays that this Court grants her permission to recant her evidence and tell the truth.

Supplementary Replying Affidavit

13. With leave of the Court as aforesaid, the State, on 11/10/2023, filed the Supplementary Affidavit sworn by Ms. Okok. In the Affidavit, she deponed that that the Affidavit sworn by the complainant does not meet the threshold of new and compelling evidence that should be admitted at the appeal stage, that the Affidavit is a desperate attempt by the Appellant to make a fresh case at the appeal stage, that there is no provision in law that allows a complainant to recant her evidence at the appeal stage, and that the Prosecution proved its case beyond reasonable doubt at the trial Court.

Expunging of Appellant’s Submissions

14. When the matter came up for Mention on 12/10/2023 for the fixing of a date for Ruling, it was confirmed that the Respondent had filed its Submissions. It however also transpired that despite voluntarily and on his own motion, expressly informing the Court that he will not be filing any written Submissions, the Appellant’s Counsel, Mr. Ayieko, had defied his own such undertaking and had on that very morning, completely against good practice, again “sneaked-in” written Submissions, again, without leave of the Court. Considering the many cases of irregularities and transgressions already committed by Mr. Ayieko, which the Court had very reluctantly “closed its eyes to” and excused, it was clear that he had abrogated to himself the avowed mission to vex the Court and “stretch its patience to the limit”. I took up the challenge and “called the bluff” by declining to admit the Submissions and swiftly expunged the same from the record. I then fixed the mater for Ruling.

Respondent’s Submissions

15. Learned counsel for the state filed submissions dated 12/06/2023 and supplementary submissions dated 09/10/2023. She opposed the application on the ground that it is not merited and there are no sufficient grounds to support the same. She cited the provisions of Section 358(1) of the *Criminal Procedure Code* and urged that the governing principles on allowing additional evidence in appellate



courts in Kenya were set out by the Supreme Court of Kenya in *Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 others* (2018) eKLR.

16. Counsel submitted that the appellant/applicant has not provided this Court with the new evidence that he wishes to adduce during the hearing of the appeal and therefore, this Honourable Court will not have a chance to examine the new evidence to enable it arrive at a proper finding. The appellant only states that he has discovered new and compelling evidence which he wishes to adduce, specifically that the complainant wishes to recant her evidence that she adduced at the trial court. He further states in his supporting affidavit that the complainant wishes to swear an affidavit to recant her evidence yet the said affidavit was not annexed to the application to enable the court peruse it and make a finding on the same.
17. Further, that the prosecution case against the appellant was water tight. Without going into the merits of the appeal, there was an eye witness PW3 who was present when the complainant was being defiled. The complainant who testified as PW2 gave water tight evidence and was categorical during cross examination that she was not coached in any way. Her age was conclusively proved by way of the immunisation card which was produced as prosecution exhibit 1. The appellant/applicant was well known to PW2 and PW3 who both placed him at the scene of crime and this evidence cannot be dislodged by a purported affidavit aimed at rebutting the prosecution's case.
18. Counsel maintained that the application is a desperate attempt by the appellant/applicant aimed at making a fresh case at appeal. As the court has not been supplied with the complainant's purported affidavit and/or any other additional evidence that the appellant/applicant wishes to rely on, she prayed that the application be dismissed for lack of merit as the reasons set out do not merit granting of leave to adduce additional evidence.
19. In her supplementary submissions, counsel submitted that she looked at the contents of the affidavit by CC who is basically recanting the evidence that she adduced at the trial court. She reiterated that there is no law that allows for a complainant to recant her evidence at the appeal stage. CC who was the complainant states that she lied concerning her age during the trial and also lied that the appellant is the one who had defiled her. It is worth noting she gave her evidence on oath. The trial court conducted a voir dire examination and noted that she was intelligent enough to testify and that she understood the nature of an oath. She was categorical that she was not coached on what to say. She told the court that she was twelve years old at the time that she was testifying and her age was conclusively proved by way of an immunization card which was produced as prosecution exhibit 1. Furthermore, there was an eye witness to the incident who testified as PW3. C now admits that she lied on oath. Counsel posed the question of how this court is supposed to believe that what she is stating in the affidavit is true. The affidavit by CC which is the additional evidence that the appellant/ applicant is seeking to introduce should not be admitted as this is a desperate attempt by the appellant/applicant to make out a fresh case at appeal. This piece of evidence is not credible as CC cannot be a truthful witness having admitted to lying while on oath. Counsel reiterated her earlier submission that the application lacks merit and the same should be dismissed in its entirety.

Analysis & Determination

20. Upon examination of the record and the pleadings filed, including the Affidavits and Submissions, I find the issue that arises for determination herein to be "whether the Appellant should be granted leave to adduce further evidence at this appellate stage".
21. Section 358 of the *Criminal Procedure Code* provides as follows;



- i. 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.
 - ii. When the additional evidence is taken by a subordinate court, that court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal.
 - iii. Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.
 - iv. Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court.
22. In the case of *Ladd v Marshall* [1954] 1 WLR 1489, the English Court of Appeal laid down a 3-part test, namely, non-availability, relevance and reliability, for an appellate Court to allow fresh evidence at appellate stage. Spelling out the principles applicable in determining admissibility of such new evidence, Denning LJ, stated as follows:
- “In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible”.
23. On the same issue, in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* (2018) eKLR, the Kenyan Supreme Court, appearing to expand the 3-part test in *Ladd v Marshall* (*supra*), also laid down the circumstances under which such additional evidence may be admitted, as follows;
- (79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate Courts in Kenya as follows:
- (a) the additional evidence must be directly relevant to the matter before the Court and be in the interest of justice;
 - (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
 - (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
 - (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
 - (e) the evidence must be credible in the sense that it is capable of belief;



- (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- (h) where the additional evidence discloses a strong prima facie case of wilful deception of the Court;
- (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
- (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
- (k) The Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

[80] We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.”

24. In this instant matter, the request to adduce additional evidence is made on the basis that the complainant has recanted her evidence given in the trial Court, on two grounds, namely, that by collusion, the complainant’s age was deliberately lowered, to cause the Appellant to suffer a stiffer sentence and secondly, that the complainant was coerced to state that the Appellant defiled her.
25. I have carefully perused the record of the lower Court and am confident, without delving too much into the merits lest I prejudice or pre-judge the Appeal, that I am in a good position to comment on the issues raised.
26. First, I note that the trial Court conducted a *voire dire* examination and satisfied itself that the complainant was aware of the consequences of lying to the Court. The complainant undertook to tell the truth. She was then sworn before giving her testimony. Looking at the record, I found her evidence to have been quite vivid, credible and consistent. Although it is not possible to make a conclusive determination, I have not found any indication of the complainant having been coerced or coached. Her evidence was firm and does not seem to have been shaken even during cross-examination. Her current “recanting” of the evidence, to me, therefore sounds suspicious and not credible or reliable.
27. Regarding the allegation that the complainant’s age of 12 years at the material time was deliberately lowered, there is no indication by the Appellant or in the Affidavit said to have been sworn by the complainant, on what age it was lowered from. This is important because under the [Sexual Offences Act](#), No. 3 of 2006, the sentence to be imposed on a convicted defiler is pegged on various ranges of age as regards the minor defiled. In the absence of any indication on what, according to the Appellant and the complainant, was the alleged correct age, this Court is left with no material to determine whether the age-lowering, even if true, made any significant change to the sentence imposed.



28. Further, I note that, although the complainant did not have a Certificate of Birth, an immunization/clinic card was produced in evidence as proof of her age and which card bore the date of birth of 30/04/2006. From the immunization/clinic card therefore, the age of the complainant as at 23/08/2018, the date when the defilement is alleged to have occurred, was 12 years. This is the same age stated in the charge sheet. Considering that the immunization/clinic card was in existence long before the trial, the allegation that the complainant's age was deliberately lowered for the purposes of the criminal case therefore sounds far-fetched.
29. Regarding the act of defilement itself, I note that it is in fact the younger sister of the complainant, an 11 years old class 4 girl – PW3 - who broke the news of the defilement to their guardians – PW1 and PW4. It was not seriously disputed that PW 3, the Appellant and the complainant spent a portion of the night together in one room in the Appellant's house. PW3 testified that she was present when the defilement occurred and that she witnessed the entire ordeal that her sister went through in the hands of the Appellant. She therefore gave eye-witness account. It was only when the complainant was asked about the defilement after PW3 had already reported it, that she confirmed it. There was therefore strong evidence of corroboration.
30. There was also medical evidence given by PW5 who produced the P3 Report and testified that upon examination, it was confirmed that the complainant had been recently defiled. The examination was conducted on 24/08/2018, the morning after the alleged defilement on the night of 23/08/2018, and it revealed multiple fresh hymenal tears in the complainant's genitalia.
31. Considering the above facts and scenario, and applying the test set out by the Supreme Court in the case of *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamad* ^{🇰🇪} (supra), I am of the view that the additional evidence sought to adduced is not such that, if given, would influence or impact upon the result of the verdict that shall eventually be passed in this Appeal. The evidence does not seem credible in the sense that it does not appear capable of belief and also it does not disclose a strong prima facie case of wilful deception of the trial Court.
32. Further, considering the Supreme Court's caution in *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamad* ^{🇰🇪} (supra), that the power to allow additional evidence at appellate should be sparingly exercised, it is my considered view that the Application does not meet the threshold to allow the additional evidence to be adduced at this stage.
33. The alleged additional evidence therefore also fails the "relevance" and the "reliability" test set out in the case of in *Ladd v Marshall* (supra).

Final Orders

34. In the premises, the Appellant's Notice of Motion dated 2/03/2023 is dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 1ST DAY OF MARCH 2024

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WANANDA J.R. ANURO

JUDGE

