Lemiso v Republic (Criminal Appeal E018 of 2023)
[2024] KEHC 3693 (KLR) (17 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3693 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDAMA RAVINE

CRIMINAL APPEAL E018 OF 2023

RB NGETICH, J

APRIL 17, 2024

BETWEEN

JAMES LEMISO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgement of the Lower court of Kenya at Eldama Ravine court dated 10 th day of March, 2021 by Hon. A. Towett [SRM] in Lower court criminal case No. 10 OF 2019)

JUDGMENT

1. The appellant James Lemisowas charged with the offence of Defilement contrary to section 8(1) of the *sexual offences Act* No. 3 of 2016.The Particulars of the charge were that on 10th day of April, 2017 at about 20:00 hours at Mogotio Sub-County, within Baringo County intentionally and unlawfully caused his penis to penetrate into the Vagina of S.J a child aged (10) years old.

2. The appellant denied the charge and the case proceeded for hearing with prosecution availing 6 witnesses to prove the charge against the accused. At the close of the prosecution case, the trial court found that the prosecution had established pima facie case to warrant accused/Appellant be placed on his defence. After defence hearing the trial court delivered judgment convicting the accused/appellant made a finding that the appellant and sentenced him to serve life imprisonment.

3. Dissatisfied with the judgement of the trial court, the Appellant filed this appeal on the following grounds:-

    i. That, the learned trial Magistrate erred in law and fact by convicting and sentencing the appellant to life imprisonment without the evidence of star witness, Shalene Jepchirchir Rotich but failed to comply with provisions of section 31 of the *sexual offences act* No. 3 of 2006.

ii. That, the learned trial Magistrate erred in law and fact by convicting and sentencing the appellant to life imprisonment but failed to note that, the ingredients of the charge of defilement were not proved to the required standards of the law the Age of the Victim, Penetration were not proved and identification of the perpetrator.

iii. That, the learned trial Magistrate erred in law and fact by convicting and sentencing the appellant to an enhanced sentence of life imprisonment but failed to note that the Appellants defense was not considered.

4. The appellant's prays for the following orders: -

a) That, the conviction be quashed, and the sentence imposed on the appellant be set aside and the appellant be set at liberty.

b) That, this honorable appellate court do issue any further orders as may be just and considered orders may be just and expedient in the circumstances.

c) That, this honorable appellate court be pleased to re-evaluate the whole evidence tendered, evaluate the high court's judgment, consider my submissions on matters of law and make an independent on both conviction and proper sentence

Appellant's Submissions

5. The appellant submits that the provisions of section 31 of the *sexual offences act* no.3 of 2006 was not adhered to. He submits that from the record, it is clear that the complainant (Shalene Jepchirchir Rotich) did not testify and the court did not conduct a voire dire examination of the witness. That on 11th September,2019 the first day of hearing, the prosecution informed court that the complainant was in the court and was disabled; that she could not stand or walk, has never uttered a word since birth and did not record a statement and prayed that she could have an intermediary. That the court held that the complainant could not testify through an intermediary and the other witness were to testify and no other witness was produced to testify on behalf of the complainant. Further that the prosecution availed the complainant before the court for the second time when recalled on 14th October, 2020 and the stated that "I have seen the complainant she cannot walk nor speak. She is carried to court."

6. The Appellant submits that he was not accorded a fair trial considering that he could not cross-examine the complainant and was therefore denied the right to a fair trial guaranteed under article 50(2) of the *Constitution* and submitted that it is paramount for the trial court to consider the evidence of the complainant as it is the person offended by the offence alleged to be committed by the appellant.

7. The Appellant submits that the court ought to have appointed an intermediary to adduce evidence of the complainant as it is a medium through which she would have communicated to the court as per the provision of article 50(7) of the *Constitution* 2010 and by the court holding that the complainant could not testify through an intermediary was contrary to provision of section 31 of the *Sexual Offences Act* and submitted that the trial court failed to follow the correct procedure in handling the said application, failed to declare the complainant a vulnerable witness. Further that the trial court did not warn itself on the prejudicial effect of proceeding to call other witnesses to adduce their evidence and denied the appellant a fair trial.

8. The appellant further submits that Section 31(3) of the *Act* provides that the court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court to advise the court on the vulnerability of such witness. Subsection (4) provides that upon declaration of a witness as vulnerable witness in terms of the section,

the court shall, subject to provisions of subsection (5), direct that such witness be protected by one of the following:-

a. allowing such witness to give evidence under protective cover of a witness protection box

b. directing that the witness shall give evidence through an intermediary; directing that the proceedings may not take place in open court: or

c. any other measure which the court deems just and appropriate.

9. That Section 31(7) of the *Act* provides that if a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may convey the general purport of any question to the relevant witness, inform the court at any time that the witness is fatigued or stressed, and request the court for a recess.

10. That the more significant is section 31(10) which provides in peremptory terms that a court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary. Also relevant is section 31(13) which provides that an accused person in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness.

11. The Appellant submits that the charge of defilement was not proved beyond reasonable doubt; that the evidence before court was marred with inconsistencies and contradictions and the case was all about suspicion which in law cannot form a basis for a conviction.

12. The appellant further submit that the age of the victim was in doubt as two contradicting documents were produced in court. That the charge sheet shows the complainant was aged 10 years old. The p3 form shows the complainant was 10 years old as stated by the Clinical officer (PW5). The mother (Pw1) told court that the complainant was born on 29th July, 2007 and produced a birth certificate with the serial number 6797669. The investigating officer PW6, PC. Emmanuel Serem produced another different birth certificate of the complainant with serial No. 041704762 after the appellant had already submitted his defence before the court dated and stated that the minor was born on 29th January. 2007.

13. Further that PW8 only relied on the information of history taken since medical age assessment was not conducted to confirm the age of the minor. That the issue as to whether the complainant was 10 years was not proved as the maker of the birth certificates were never called to produce the said birth certificates and explain how the age was arrived and age was not proved beyond reasonable doubt.

14. The Appellant submits that evidence PW1 and PW4 did not prove penetration to the required standards of the law; that medical evidence does not need to be availed to prove penetration but as long as there was evidence to prove that there was even partial penetration on the surface, the ingredient of the offence is demonstrated.

15. That the trial court stated that on penetration, PW3 and PW4 informed the court that they found accused inside their parent's house defiling the victim whilst half naked and they locked in the house. Further that PWI and PW2 corroborated PW4 and PW5's evidence when they said they were called and they found appellant locked inside the house. The Appellant however argues that evidence of PW3, PW4 and PW5 was not sufficient to prove penetration or prove penetration.

16. Further that the trial magistrate misdirected himself when he held that accused was found in the act by PW3 and PW4 and later by PW1 and PW2 and concluded that the appellant was identified during and after he was arrested.

17. The appellant further submits that the family to the complainant owed him a balance of 10,000 for construction of a house which was the source of him being framed up. Further that the torch alleged to have been used to identify the appellant at the scene by PW3 and PW4 was not produced in court as exhibit; that in visual identification, care has to be taken to ensure that the conditions prevailing at the time of the recognition was favorable as the incident is alleged to have occurred in darkness at night and there were inconsistencies and contradiction on the evidence of PW1, PW2, PW3 and PW4.

18. Further that even if the appellant raised his defense of alibi for the first time while in court, the prosecution was supposed to invoke section 309 of the *Criminal Procedure Code* and seek leave to adduce further evidence in reply to rebut the appellant's defense of alibi.

Respondent's Submissions

19. On whether circumstances were not favorable for positive Identification, the Respondent submits that Pwl testified that he knew the appellant well as fundi as he had been engaged to construct a house and he heard the appellant say "Mniachilie niende" meaning "let me go" and he recognized the appellant's voice and he knew the appellant; that the appellant's identification was identification by recognition of voice.

20. Further, PW2 testified that he received information that the complainant had been defiled, and rushed to the scene where he found the appellant and the complainant locked together in the same house. Pw2 opened the door, grabbed the appellant who pleaded for mercy saying "Nisamehe" and when pw2's wife arrived and screamed, the appellant overpowered Pw2 and escaped. He identified the appellant by using a torch which Brian held for him.

21. Respondent further submit that Pw3 is an elder sister to the complainant and on 10th April, 2017 was at home revising with his elder brother B when they heard screams from the complainant and rushed there to see what was happening. They found the appellant lying on top of the complainant having carnal knowledge of her. B pulled the complainant off and threw her out. B locked the door closing the appellant inside. That he rushed to call her dad and informed him "ametomba mtoto" "meaning he has defiled the child" and together they went in and found appellant lying on the complainant. With the torch they were able to see the appellant who was found defiling the child. The respondent submits that Pwl,Pw2 and pw3 interacted with the appellant for some time and had good opportunity of noticing him well and the circumstances surrounding the case afforded the witnesses humble opportunity for a positive identification as all witnesses knew the appellant before the incident and was found at the scene of crime and submit that prosecution evidence was well corroborated and consisted and in cross examination, the appellant was unable to rebut the assertions and /or allegations made against him.

22. On whether medical evidence supported the offence, the respondent submits that the doctor found that the complainant was defiled and produced P3 in court as an exhibit in court and the medical evidence was uncontroverted.

23. In submitting on whether age of the complainant was proved beyond reasonable doubt, the Respondent argues that when the court retired to write its judgement, the learned trial magistrate realized that the prosecution closed its case without producing any document to prove the age of the complainant and invoked the provisions of section 150 of the *criminal Procedure Code* which empowered him to recall one or more witnesses to attend court for production of a document; the investigation officer was recalled by the court and he produced birth certificate No.04XXXX62 as exhibit 4 and the issue prove of the complainant's age was therefore cured by recall of the witness under section 150 of the *criminal procedure code*.

24. On the issue of the complainant being mentally unstable to adduce evidence, this court will of necessity be compelled to delve into provisions of law to consider whether the trial Magistrate recorded a finding touching on the complainant's competence to testify and if found to the contrary, then the appellant may be entitled to a retrial.

25. On whether appellant's defence was considered, the Respondent submits that the general principle of law is that if an accused person raises a defence, the trial court is enjoined to consider it and make a finding thereon and it does not matter whether the same makes sense or not; on whether the appellant's defence was considered, the respondent submits that appellant's defence was duly considered and a finding made thereon.

Analysis and Determination

26. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court t fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of *Okeno vs Republic*[1972] EA 32 where it was stated as follows:-

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v. Republic* [1957] EA 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, (See *Peters v. Sunday Post*, [1958] EA 424.)"

27. Further in *Mark Oiruri Mose – Vs- Republic* [2013] eKLR 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 grounds of appeal, the record of appeal and the rival submissions by the parties herein and consider the following as issues for determination: -

    i. Whether the ingredients for the offence of defilement were proved beyond reasonable doubt and whether the trial court considered the Appellant's defence.

    ii. Whether the sentence imposed against the Appellant was harsh, excessive and unconstitutional.

i. Whether the ingredients for the offence of defilement were proved beyond reasonable doubt and whether the trial court considered the Appellant's defence.

29. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See *C.W.K v Republic* [2015] eKLR).

(a) Penetration

30. Penetration is defined under Section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person. 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.

31. In this case the complainant did not testify for the reason that she is mentally retarded. The Doctor who examined the complainant testified that she was mentally retarded and that he noticed tears and inflammation on her vulva and her hymen was freshly broken. He produced the P3 Form as P exhibit 3 in court. Besides the doctor's evidence, PW3 and PW4 found the Appellant while defiling the complainant hence the issue of penetration had been proved beyond reasonable doubt.

(b) Proof of age

32. In respect to proof of age in respect to defilement, the Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) had this to say: -

> " ... 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."

33. The Investigations Officer P.C Emmanuel Serem produced a birth certificate which showed that the minor was born on 29th January, 2007. This confirmed that the complainant was 10 years old at the time of the offence.

(c) Identification of assailant

34. In respect to identification, PW1's testimony is that she knew the appellant well as fundi as they had engaged him before the incident to construct a house for them. As the assailant escaped, PW1 heard him say "Mniachilie niende" meaning "release me to go" and recognized the appellant's voice because he knew it well.

35. PW2 testified that he received information that the complainant had been defiled, and rushed to the scene where he found the appellant and the complainant locked together in the same house. He opened the door and grabbed the appellant who pleaded for mercy; saying "Nisamehe" meaning "forgive me" and when pw2's wife arrived and screamed, the appellant overpowered Pw2 and escaped. Pw2 identified the appellant by using a torch which B held for him.

36. Pw3 an elder sister to the complainant responded to complainant's screams together with her brother B. B said he had a two-battery torch which they used to see the appellant. He said they found appellant lying on the complainant and flashed the torch on his face and recognized him. He said the complainant's trouser was pulled down to the knees, while complainant had no clothes. B pulled the complainant off and threw her out and locked her in the kitchen while they locked the appellant in the house. B then rushed to call his father telling him "ametomba mtoto" meaning he has had carnal

knowledge of the child.pw3 said he knew appellant as a fundi as he built his father's house. They took out the complainant, and locked the appellant in the house.

37. A report was made to the police and appellant was later arrested. That up until this stage the facts and circumstances clearly show that appellant was clearly identified. Further, the torch had two new batteries; hence it was bright enough for purpose of identification. That from the foregoing it is conclusive therefore that the offence of defilement was proved beyond reasonable doubt.

38. The Appellant has complained that his defence was not considered by the trial court. I note from the judgment that the learned magistrate considered the accused defence when he indicated that, "I have considered the defence propagated by the accused herein. He informed the court that the complainant family trumped up the charges against him owing to some debt they had not paid him. I do not believe his line of defence. The clinical officer is on record informing the court that the complainant had a freshly broken hymen. She was examined the next morning after the offence. It is clear in my mind that the accused having been familiar with the complaint's home, took advantage of the vulnerability of the mentally retarded complainant to violate her. I do not have any iota of doubt in my mind that the accused have defiled the complainant."

39. From the foregoing, it is therefore not true that his defense was not taken into consideration. I agree with the trial magistrate that the accused is merely denying the crime as the prosecution case was proved beyond reasonable doubt.

(ii) Whether sentence imposed was harsh and excessive

40. On whether the sentence meted on the appellant 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*.

41. 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."

42. Further, the Court of Appeal while dealing with the issue of sentence in the case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR restated as hereunder: -

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

43. Under Section 8 (2) of *sexual offences Act* A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The trial court imposed the mandatory life imprisonment on the appellant. However, the Court of Appeal in Malindi Criminal Appeal No.12 of 2021 Between *Julius Kitsao Manyeso vs Republic* declared the sentence of life imprisonment to be unconstitutional, Justice Nyamweya, Lesiit and Odunga stated that it is unfair for a person to be behind bars until they die.

44. In view of the above decision, I am inclined to set aside life sentence and impose determinate sentence. While imposing determinate sentence, I take not of the fact that the child defiled was 10 years old, she is mentally retarded. The appellant took advantage of the defenseless child instead of playing societal role of protecting young children and the vulnerable members of the society. In view of the above, I am inclined to impose sentence of 30 years imprisonment. The period the accused served in remand and the period he has served in prison to be considered while computing sentence.

45. Final Orders: -

    1. Appeal on conviction is hereby dismissed.
    2. Sentence of life imprisonment is hereby set aside.
    3. Appellant is hereby sentenced to 30 years imprisonment.
    4. The period that appellant was in remand and has been in prison to be computed in the sentence.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 17TH DAY OF APRIL 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

CA Karanja.

Ms. Ratemo for state.

Appellant present.