Lukonzo v Republic (Criminal Appeal 90 of 2019)
[2024] KEHC 9330 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9330 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 90 OF 2019

SC CHIRCHIR, J

JULY 18, 2024

BETWEEN

EDWARD LUKONZO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgment of Hon. D ALEGO (SPM) Delivered on 30/7/2019 on Kakamega sexual offence case No. 61 of 2018)

JUDGMENT

1. Edward Lukonzo, the Appellant herein, was charged with defiling a 10 year- old child, contrary to Section 8(1) and 8 (2) of the *Sexual Offences Act* No. 3 of 2006 (The Act) .

2. The particulars of the offence were that on the 14th day of June 2018 at Shimanyiro sub-location, Shisele location, in Kakamega County, intentionally and unlawfully caused his penis to penetrate the vagina of CI a child aged 10 years, who is mentally vulnerable.

3. On the alternative , the accused was charged with committing an indecent Act with a child contrary to section 11(1) of the *sexual offences Act* No. 3 of 2006.

4. The particulars of the offence were that on the 14th day of June 2018 at Shimanyiro sub-location Shisele location in Kakamega County intentionally and unlawfully caused his penis to touch the vagina of CI a child aged 10 years who is mentally vulnerable.

5. The Appellant denied the charge and at the conclusion of the hearing, the Appellant was convicted of the main charge and sentenced to 30 years in prison.

6. He was dissatisfied with the outcome and filed this petition of Appeal, while setting out the following grounds:

a). That the learned trial magistrate grossly erred in law and in facts in presiding over a trial without proper forum.

b). That the learned trial magistrate grossly erred in law and in facts in proving penetration proved in the wake of flimsy and inadequate evidence.

c). That the learned trial magistrate grossly erred in law and in facts in convicting him without considering that he was not subjected to medical corresponding investigation.

d). That the learned trial magistrate grossly erred in law and in facts in convicting him without serving that the age of the victim was not established in accordance of law.

e). That the learned trial magistrate grossly erred in law and facts in rejecting his defence without proper evaluation.

f). That the learned trial magistrate grossly erred in law and in facts in basing a conviction on evidence that was uncorroborated, inconsistent, flimsy and inadequate.

7. On 22nd November 2023 the Appellant filed what he called 3 supplementary grounds of Appeal and sated as follows:

a. That the trial court erred in law and in fact in not weighing the conflicting evidence in the prosecution case that went to the root of this case .

b. That the trial court erred in law in relying on inconclusive evidence of identification by recognition of a single minor witness uncorroborated(sic).

c. That in case of a dismissal of appellant's appeal on conviction. The appellant's sentence to be computed from the time of his arrest pursuant to the provision in section 333(2) Penal code and the court to make further discretion as it may deem fit.

8. The Appeal was canvassed by way of written submissions.

Appellant's submissions

9. On his first ground of Appeal, the Appellant submits that there was conflicting evidence on the part of the complainant as to who defiled her one Erick kanyika. He argues that the complainant was coached to implicate the Appellant; He faults the trial court for relying on inconclusive evidence on the aspect of identification. In this regard he has relied on the case of *Simiyu and another v Republic* (2005) KLR 192 on the issue of identification as well as the case of Joseph Leboi v Republic criminal Appeal No. 70 of 1987 to buttress the difference between recognition and identification.

10. The Appellant further submits that generally there was conflicting testimonies on the date of the alleged defilement; that there is contradiction on whether the complainant was defiled in a sugarcane or in a maize plantation. He argues that such material disparities cast a reasonable doubt on the veracity of the evidence presented by the prosecution.

11. He prays that in the event that his Appeal on conviction is dismissed this court order that his sentence runs from the time of his arrest pursuant to section 333(2) of the *Criminal procedure code*.

Respondent's submissions

12. It is the respondent's submissions that all the ingredients of defilement were proved.

13. It is submitted that on age of the complainant, a birth certificate was produced indicating that the deceased was born on 10/09/2009 and therefore she was 10 years old at the time of defilement.

14. On penetration, it is the respondent's submission that the testimony of the complainant proved penetration, and that in any event her evidence was corroborated by the evidence of PW3 , who told the court that the complainant had pain and tenderness in the inner vaginal wall and her hymen was broken.

15. On identification, the respondent submits that positive identification was proved.

16. The respondent however points out that the record does not indicate that the accused was given a chance to cross- examine the complainant. The respondent states that this constituted a violation of the Appellant's right to fair trial under Article 50(2) (k) of the *constitution*. The respondent has referred to the case of *Nahashon Otieno Odhiambo v Republic*(2019) e KLR where the cour, while citing the decision in *Nicholas Wambui Mutoka v Republic* (citation not provided) in which it was held that cross- examination of a witness who had given evidence not on oath is permitted by law for purposes of testing the veracity of such child's evidence.

Determination.

17. The issue of failure to give a chance to the Appellant to cross- examine the complainant has not been raised by the Appellant in this Appeal. However, a perusal of proceedings does not indicate that the Appellant was invited to cross- examine the complainant. The record of proceedings show that after the complainant's Evidence- in -chief, what followed next was the testimony of PW2. To the extent that the record does not indicate that the Appellant was invited to cross- examine the complainant, the only conclusion one can arrive at is that the Appellant was not given a chance to cross- examine the compliant.

18. Article 50(2) of the *constitution* provides that every accused has a right to a fair trial, and under sub-Article (K) of Article 50 the right of the accused to adduce and challenge evidence is a component of fair trial.

19. Furthermore, section 302 of the *Criminal Procedure Code* stipulates that: "The witnesses called for the prosecution shall be subject to cross examination by the accused person or his advocate and to reexamination by the advocate for the prosecution."

20. In *Nicholas Mutula Wambua v Republic*, MSA CRA No. 373 of 2006, the court of Appeal cited with approval the decision of the Supreme Court of *Uganda in Sula v Uganda* [2001] 2 EA 556 where the court held:- "The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined".

21. Thus, there it is evident that the law of the right of an accused person to cross- examine all the prosecution witness is well settled. The contrary constitutes a violation of an accused right to fair trial.

22. In the circumstances, I agree with the respondent that the Appellant's right to fair trial was breached. Consequently, the Appellant's conviction is hereby quashed and sentence set aside.

23. The next question is whether a pre-trial should be ordered

24. The principles governing considerations of a retrial has been a subject of discussions in many past decisions of the superior courts. The Court of Appeal for East Africa in *Fatehali Manji v. The Republic* [1966] EA343 the laid down the principle as follows: "In general a retrial 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 purposes 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 own facts and circumstances and an order for retrial should only be made where the interests of justice requires it."

25. In *Opicho v. R* [2009] KLR 369, 375 it was further stated : "In many other decisions of this Court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible evidence or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it.

26. In the present case , the omission was on the part of the court , not prosecution. The Appellant was convicted and sentenced on 30/7/2019, and hence he is serving his 5th year of the term. Further I have considered the evidence available and the fact that the victim was a child with some mental disability . She too is entitled to justice based on the merits of the case. Am of the view therefore that interest of justice would be served by a retrial.

27. In conclusion I make the following orders:

    a. The conviction of the Appellant in Kakamega chief magistrate's court in sexual offences case No. 061 of 2018, is hereby quashed, and sentence set aside.

    b. The Appellant to be retried. He shall be produced before the lower court for a retrial, , as soon as reasonably practical and at any rate he will be presented to court for plea- taking not later than 14 days from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF JULY, 2024.

S. CHIRCHIR

JUDGE.

In the presence of:

Godwin – Court Assistant

The Appellant.