Laban v Republic (Criminal Appeal E047 of 2023)
[2024] KEHC 12047 (KLR) (2 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12047 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E047 OF 2023

RPV WENDOH, J

OCTOBER 2, 2024

BETWEEN

PHILLIP MAKUBI LABAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence by Hon. M. O. Obiero – Senior Principal Magistrate in Kehancha Senior Principal Magistrate's Court S.O. No. E029 of 2022 delivered on 31/7/2022)

JUDGMENT

1. Phillip Makubi Laban has filed this appeal against the judgment of the Senior Principal Magistrate, Kehancha, in which he was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. In the alternative, the appellant faced a charge of committing an incident Act with a child contrary Section 11 (1) of the *Sexual Offences Act*.

2. The particulars of the charge are that on 17th July, 2022, at Kuria West Sub County within Migori County, intentionally caused his penis to penetrate the vagina of L.A. a child aged 15 years old and in the alternative; intentionally touched the vagina of L.A. a child aged 15 years with his penis.

3. The appellant denied the offence and the case proceeded to full hearing with the prosecution calling a total of five witnesses in support of their case namely; PW1, the complainant child L.A.C., PW2 LA, the Complainant's grandmother, PW3, PC Abraham Cheruiyot No. 256818, the Arresting Officer, PW4 Francis Manyinza a clinical officer at Kehancha Sub-County Hospital and lastly PW5 IP Agatha Wekesa No. 234774, the investigating officer attached to Kehancha Police Station.

4. When placed on his defence, the appellant gave a sworn statement and did not call any witness in support of his case.

5. Upon conviction, the appellant was sentenced to serve twenty (20) years' imprisonment. He is aggrieved by both the conviction and sentence which has culminated in this appeal. The grounds of appeal filed in court on 08/08/2023 and Supplementary grounds filed with the written submissions are that: -

    1. The learned trial magistrate erred in not finding that the charge was not proved beyond reasonable doubt.

    2. The whole trial was marred with irregularities and it is not hidden that he was fixed in the matter.

    3. Based on the foregoing the sentence meted herein is illegal in its entirety, harsh and excessive. Further, that the trial magistrate erred in fact when he was bound by the provisions of the *sexual offences act* in sentencing and failed to exercise his discretion.

    4. The learned trial magistrate failed in law and in fact when he failed to take into account the time spent in custody under section 333(2) of the criminal procedure code

6. The appellant therefore prays that the Appeal be allowed, conviction quashed, sentence set aside.

7. The Appeal was canvassed by way of written submissions. The appellant filed his undated but signed written submissions while the Prosecution counsel Ms. Ikol Esaba opposed the appeal through their submissions dated 25/03/2024.

8. This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court, evaluate and analyse it and arrive at its own conclusion. The court has to however make allowance for the fact that this court neither saw nor heard the witnesses testify, an opportunity which the trial court had. This court is guided by the decision of Okeno vs. Republic (1972) EA 32 where the Court of Appeal said: -

> " 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 v. R., [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. Ruwala v. R., [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, see Peters v. Sunday Post, [1958] E. A. 424."

9. PW1, gave her testimony on oath after a voire dire was conducted and she was found competent to give sworn testimony. She told the court that she was born in the year 2007, She confirmed that she knew the appellant as her neighbour; that in July, 2022 at about 7:00pm, she was heading home from the market in the company of her friend one Elizabeth, when she saw the appellant, who had earlier asked her to be his girlfriend. He called her and she went. They spent the night in the appellant's house; PW1 shared a bed with Elizabeth. In the morning of the following day, the appellant asked Elizabeth to go to the sitting room, He went into the bedroom and told her that "he wanted her to give him and she gave him"; she removed her pant and the appellant removed his trouser and they had sexual intercourse. She later told her grandmother what had happened. She was taken to the hospital and examined. Later the appellant was arrested; that they only had sex in the morning. On cross-examination, she stated that she was taken to the hospital on 18/7/2022 and 21/7/2022, at the time she had already taken a bath,

10. PW2, the complainant's grandmother, stated that PW1 did not spend the night at home on the 17/7/2022 but went back home on the evening of 18/7/2022. She reported the same to PW1's school and later the Area Chief. She later found PW1 and one Elizabeth at the Chief's Office. She further stated that she did not know the appellant prior to the date of the incident. She conceded that she did not know where the complainant had spent the night,

11. The Arresting Officer (PW3) stated that on 20.7.2022 at around 5:00pm, he was at the police station when he was called by the OCS. He saw two school girls, the complainant and one Elizabeth, their teachers and Elizabeth's father. They explained where they spent the night of 17.7.2022 and later the complainant also explained that the appellant had sex with her in the morning of 18/7/2022. On the same day they were led to the appellant's house, they found him at the barber shop and he was later arrested after a positive identification by the complainant and charged with the offence.

12. PW4 testified on behalf of the clinical officer who examined the complainant who stated that she had been defiled. He stated that the victim was in fair general condition, at the time of the examination, the age of the injury was approximately. Four(4) days. The victim was 15 years old. She had normal labia, there was presence of discharge, there was no spermatozoa, all the tests done were negative, the hymen was broken and he made an impression of penetration. He further stated that the minor was on family planning and the minor had confirmed to have been previously been involved in sexual intercourse. He produced the Treatment Notes, P3 Form and the PRC Form as Exhibits 2,3 and 4 respectively.

13. The investigating officer (PW5) stated that on 20.7.2022 she received a report from Masaba Police Post of defilement of two school girls. The following day, she interviewed the two girls; she recorded the complainant's statement, who gave a full narration of the events of the day of the incident. The appellant was subsequently charged with the offence. She also produced the complainant's certificate of birth as Exhibit 1.

14. The appellant denied committing the offence. He stated on oath that on 17/7/2022 he was in Sirare; that on 21/7/2022 he went back to his house after work, was arrested and taken to the police station. He met two girls who were strangers to him.

15. In support of the appeal, the appellant submitted that he was given the minimum mandatory sentence as per the provisions of the *Sexual Offences Act*. He relied on the decision in the case of Maingi & 5 Others vs DPP & Anor [2022] KEHC 13118 (eKLR) where Odunga J. (as he then was) held that, "to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentence with no discretion to the trial court to determine appropriate sentence to impose, such sentences fell afoul of Article 28 of *the Constitution*. The appellant therefore urged the court to reduce his sentence and/or release him upon taking into account the circumstances of the case.

16. On whether the prosecution proved their case to the required standard; it was the applicants submission that from the record, the complainant was with one Elizabeth and Elizabeth's boyfriend on the date of the incident. However, the two were not called as witnesses. Further, that from the evidence of PW4, the Clinical Officer, he stated that the complainant was on family planning and that she had been involved in sexual intercourse. He thus maintained that he was implicated by the complainant and had the two crucial witnesses been called then he would have been vindicated.

17. Lastly, he submitted on the provision of section 333(2) of the CPC and stated that the trial court did not take into account the time he had already spent in custody and relied on the case of Ahamad Abolfathi Mohammed & Another vs Republic (2018) eKLR.

18. In her submissions, Ms. Ikol- Esaba for the Prosecution submitted on the

19. She first submitted on the issue of penetration; she outlined the definition of what amounts to penetration according to the *Sexual Offences Act*. It was her submission that the testimony of the victim was corroborated by PW4, the clinical officer, who produced the treatment notes, P3 Form and the PRC Form and indicated that there was evidence of penetration; there was presence of discharge. She thus maintained that the testimony of the victim was cogent and the same was corroborated by PW4 who examined her, that the same had therefore been sufficiently proved by the prosecution.

20. On the age of the victim, it was her submission that PW5 produced the minor's Birth Certificate, which showed that the minor was born on 16/5/2007. Thus, at the time of the incident, the victim was 15 years old hence below the age of 18 years as per the definition under section 2 of the Children's Act. She submitted that the same had therefore been proved beyond reasonable doubt.

21. Lastly, on the identification of the appellant, it was submitted that the appellant was well known to the victim; that she had known the appellant for some time and he had earlier asked her to be his girlfriend; That on the morning of the day of the incident, the appellant asked one Elizabeth to go to the living room and he thereafter went into the bedroom where they had sexual intercourse. There is therefore no doubt that she could positively identify the appellant as the perpetrator.

22. On whether the sentence meted out by the trial court was harsh and excessive; she submitted that the appellant was given an opportunity to tender his defence, that the sentence was within the provisions of section 8 (3) as prescribed in law and the same cannot, therefore, be said to be harsh and excessive.

23. The final issue was on compliance with section 333 (2) of the Criminal Procedure Code and failure to factor in the time spent in remand; Counsel submitted that the appellant was arrested on 21/7/2022 and judgment was rendered on 31/7/2023. She conceded that the time spent in remand was not considered by the trial court.

24. I have carefully read and understood the amended grounds of appeal, record of appeal and the rival submissions. This being an offence of defilement, the prosecution had the duty to prove beyond any reasonable doubt the following: -

    1. Proof that the complainant was a minor;
    2. Proof of penetration;
    3. Proof of identification of the perpetrator.

    See the case of Charles Wamukoya Karani vs Republic Criminal Appeal No. 72 of 2013

Proof that the Complainant is a minor.

25. Age is a critical aspect in Sexual Offences and must be proved conclusively. PW1, PW4 and PW5; all stated that the victim was 15 years old and was therefore still a minor at the time of the offence on 18/7/2022. Further, PW5 produced a copy of the Birth Certificate as Exh. 1 and which showed that the victim was born on 16/5/2007, thus below the statutory age limit as provided in the Act.

26. Rule 4 of the Sexual Offences Rules, 2014 provides that:-

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents."

27. This position was further buttressed by the Court of Appeal in the case of Mwalango Chichoro Mwanjembe vs. Republic, Mombasa Criminal Appeal No. 24 of 2015 [2016] eKLR held as follows: -

> 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 documentary 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense..... "

28. I therefore find that the birth certificate produced as Exh. 1 is a prima facie proof of the age of the victim to the required standard. She was 15 years old at the time of the incident and hence a minor.

Proof of penetration.

29. Penetration has been defined under section 2 of the *Sexual Offences Act* as "partial or complete insertion of the genital organs of a person into the genital organ of another person."

30. PW1 in her testimony gave a detailed narration of what happened on the day of the incident; they all spent the night in the appellant's house; on the morning of 18/7/2022, the appellant asked Elizabeth to go to the sitting room, when they remained in the bedroom alone. "He asked her to give him and she gave him" she removed her pant, the appellant also removed his trouser and they had sexual intercourse and the injuries were about 4 days old.

31. PW1's testimony and evidence were corroborated by the testimony of PW4, the clinical officer, who also produced the Treatment Notes and the P3 Form as Exhibits 2 and 3 respectively. In his findings, he stated that, the labia was normal, there was no spermatozoa, no discharge, the hymen was broken and an impression of penetration was made.

32. The Court of Appeal in the case of Mark Ouiruri v Republic (2013) eKLR, expressed itself on what amounts to penetration as follows: -

> ..... In any event, the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and the penetration need not be deep inside the girl's organ...."

33. From the above caselaw, it is clear that the evidence of spermatozoa or absence thereof cannot rule out the fact that there was penetration. In this instant case, I note that the victim was not taken to the hospital immediately and by the time she was examined she had already taken a bath. There is therefore a possibility that some of the crucial evidence may have been washed off.

34. The appellant in his submissions also stated that the testimony of PW4 was that the complainant was on family planning and that she had previously been engaged in sexual intercourse. I must state that this does not however negate the fact that there was penetration and at the time of the incident the complainant was a minor and could not give consent to engage in sexual intercourse.

35. I therefore note that the complainant did not explain the exact act but from her testimony and PW4's, she knew exactly what she meant by her and the appellant having sexual intercourse. It was penetrative sex.

36. It is therefore my finding that penetration was sufficiently proved to the required threshold.

Proof of Identification of the Perpetrator of the offence.

37. The appellant denied knowing PW1. In his defence, he stated that on the 17/7/2022, he was in Sirare; In effect, he was raising an alibi defence, it is trite law that when an accused person pleads an alibi, the burden of proving the falsity or otherwise, if at all, of the said defence of alibi lies with the prosecution. The Court of Appeal in the case of Victor Mwendwa Mulinge V Rep (2014) eKLR had this to say on alibi defence

38. It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja V. Rep.(1983) KLR 501.... This court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought".

39. See also SSentale V. Uganda (1968) E.A 365. Where the then CJ Udo Udoma said " a prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer". It is a misleading to refer to any burden as resting on the prisoner in such a case, for the burden of proving his guilt remains throughout on the presentation". The appellant's alibi was very vague so that even if the prosecution were given time to test it, it would have been unnecessary. The same was also raised late in the defence therefore an afterthought. It did not in any way dislodge the prosecution evidence.

40. There is no dispute that the appellant was well known to the victim. This fact was confirmed by PW1's testimony. She stated that the appellant had previously asked her to be his girlfriend; that she went to his house in the company of her friend and they all spent the night in his house. Further, it was her testimony that they had sexual intercourse in the morning of 18/7/2022. PW1 spent ample time in close contact with the appellant to be able to know him.

41. In the circumstances, I find that the evidence of PW1 was firm, cogent and consistent and the same clearly demonstrates that the appellant had sexual intercourse with her. I must also point out that the averments of the appellant that crucial witnesses, one Elizabeth and her boyfriend, were not called to testify are misguided. First, there was no mention of Elizabeth's boyfriend in the evidence. There was no explanation as to why Elizabeth was not called as a witness. However, the evidence by PW1, PW4 and PW5 was cogent and sufficient to prove the prosecution's case on defilement beyond reasonable doubt.

42. In view of the foregoing, I find that the appeal is not merited. The conviction by the trial court is safe. As regards the sentence of 20 years meted by the trial court, I will not interfere with it in view of the Supreme court decision Pet.E01/2023 Rep V. Joshua Gichuki Mwangi and Amicus curae where the Supreme Court held that Section 8 of the SOA has not been amended to remove the minimum mandatory sentence and it remains the law until a person moves the court and the case is heard by the courts till the Supreme Court to determine the issue. In the circumstances, the sentence is lawful. The sentence will commence from the date of plea on 22/7/2022

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 2ND DAY OF OCTOBER, 2024.

R. WENDOH

JUDGE

In presence of; -

Majale for the state

Appellant Present

Court Assistants - Juma