JKK v Republic (Criminal Appeal 54 of 2019) [2023] KEHC 2101 (KLR) (15 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2101 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 54 OF 2019

J WAKIAGA, J

MARCH 15, 2023

BETWEEN

JKK .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the original conviction and sentence in Murang'a Chief Magistrates Court Sexual Offence No 11 of 2012 delivered by Hon.V Ochanda on 21/11/2019)

JUDGMENT

1. The Appellant was charged, tried and convicted on the offence of Defilement Contrary to Section 8(4) of the *Sexual Offences Act* and sentenced to serve fifteen years imprisonment.
2. Being dissatisfied with the said conviction and sentence, he filed this Appeal and raised the following amended Grounds of Appeal:
    a. The trial was conducted in a language which he did not understand and therefore the trial was not free and fair.
    b. The Appellant being unrepresented was not advised on his rights as regards the production of documents and reports.
    c. There was no sufficient evidence to sustain a conviction.
    d. Vital Prosecution Witnesses were not called to testify.
    e. The trial Court took into account extraneous consideration and findings which were prejudicial to the Appellant in addition to shifting the burden of proof to the same.

3. Directions were given on the hearing of the Appeal by way of Written Submissions which were duly filed. On behalf of the Appellant it was submitted that the trial was conducted mainly in Kiswahili and English, whereas the Appellant had indicated that his language of choice was Kikuyu, thereby making the trial unconstitutional and irregular, in support of which the following cases were tendered: *Muslim odema Hamsa vs Republic [2020] eKLR*, *Jackson Leskei vs Republic [2006] eKLR*, *Jason Akhonya vs Republic [2014] eKLR* and *Wilson Kipchirchir Koskei vs Republic [2019]eKLR*.

4. It was submitted that the age of the complainant was not proved as no birth certificate was produced, with the prosecution only relying on the age assessment report by a Doctor who was not called to testify. It was contended that the mother of the victim who was a vital witness was never called to testify and neither was the Appellant examined or his DNA profile taken, so as to connect him with the offence.

5. It was contended that the Appellant having been in presentment for a period of three years, afresh hearing would prejudice the Appellant as was stated in *Bernard Muthini Mbombo vs Republic [2019] eKLR*.

6. On behalf of the prosecution, it was submitted that a perusal of the record shows that the trial was conducted in three languages of English, Kiswahili and Kikuyu with the charges being read to him in Kikuyu language, thereby complying with the *Constitution* and the dicta in Jason Akhonya Makokha (supra). It was contended that the Appellant cross-examined all the witnesses and testified in his defence in Kiswahili language and as was stated in *Mugo & 2 others v R [2008] eKLR*, it is not every case where language is not shown which will make an Appellant to successfully raise the issue of the language before the Court.

7. It was submitted that all the documentary evidence relied upon by the Respondent were produced in compliance with the law and the age of the victim was proved through her testimony as corroborated by the age assessment report which put her age at above 12 years but below 15 years. It was contended that the age of the victim was proved beyond any reasonable doubt.

8. It was submitted that the Appellant was identified by recognition as the complainant testified that he was her step father whose evidence was corroborated by her mother and PW5 the Assistant Chief whose evidence was that he knew both Appellant and PW1 and as was stated in the case of *Anjononi & others v Republic [1980] KLR* identification by recognition was more satisfactory more assuring and more reliable than that of a stranger. It was contended that penetration was proved through the evidence of PW1 on how the Appellant defiled her three times, which evidence was corroborated by PW3 who produced the P3 Form in which it was confirmed that she had bruised labia minora, hymen was perforated and the vagina cavity was lumpy with a foul smelly discharge.

9. On sentence it was submitted that the charge if proved attracted a mandatory sentence of fifteen years and since sentencing is at the discretion of the Court, it was submitted that the Court exercised the same correctly and judiciously in support of which reference was placed on the case of *Bernard Kimani Gacheru v Republic [2002] eKLR* to the effect that an Appellate Court will not easily interfere with sentence unless , that sentence is manifestly excessive in the circumstances of the case or if the trail Court overlooked some material facts and that even if the Appellate Court feels that the sentence is heavy and that it might have not passed that sentence, that is not a ground to interfere with the discretion of the Court.

10. This being a first Appeal, the Court is required to re-evaluate the evidence tendered at the trial and to come to its own verdict though giving an allowance to the fact that it did not have the advantage of seeing and hearing witnesses.

11. PW1 testified when she was 18 years old and stated that the Appellant raped her when she was 13 years when her mother had gone to the shop and church and that she informed her friend in school who informed her teacher who inquired as to why she did not report. In cross examination she stated that the Appellant inserted his 'MIT' in her thing for urinating and that no one saw them. She was taken to the hospital by her teacher.

12. PW2 MN stated that the complainant told her that her father had defiled her so she decided to tell their teacher. PW3 Patrick Mwangi produced the P3 form on behalf of the marker who had by then retired and confirmed penetration through examination and that the victim was a companied by her teacher to the clinic. PW4 Phylis Wangari Mwangi stated that on July 4, 2012 the teacher on duty reported that the victim had been defiled by her step father so she decided to report to the Education Office, then to the Chief and that the mother of the child went with her to the police.

13. PW5 JMM stated that the headmaster of the victim's school called him in the morning with the information on the victim and that when she was called to the office she confirmed the allegations. He stated that the Appellant whom he knew was married to the mother of the victim, though he was not the biological father. He later arrested the Appellant at his home. PW6 PC Doris Agolla received the victim and her teacher at the police station and took her to the hospital where she was issued with P3 form. In cross examination, she stated that the mother of the victim did not record a statement. PW7 CPL Anne Namtati produced the exhibits and that at the time of the trial the complainant had been married.

14. When put on his defence, the Appellant testified that the complainant was her child and that he was only charged because he had stopped her from being married which her mother insisted on. DW2 GMK the mother of the Appellant stated that she did not know what caused the Appellant to be arrested but confirmed that he was living at Sagana at the time with the mother of the victim.

Determination

15. From the proceedings and submissions herein, the following issues have been flagged for determination:

    a) What was the language of the trial and whether the Appellant was prejudiced?

    b) Whether the age of the complainant was proved.

    c) Whether the prosecution case was proved.

16. On the issue of language used, the Court record shows that the Appellant took plea on July 5, 2012 and he pleaded not guilty in Kikuyu language and on the 26th, the same is recorded to be asking for statements and on March 8, 2016 the Court records shows that the Appellant requested for a Kikuyu interpreter and the Court adjourned to get one. PW2 testified in Kikuyu language and was cross examined by the Appellant in the same language while on November 3, 2016 PW3's evidence was translated from English to Kikuyu by Kanyoro, PW4 evidence was translated to the Appellant in Kikuyu language by E and PW5 and 6's evidence was translated by N while PW7 by G.

17. Am therefore satisfied that the trial was conducted in a language which the Appellant understood and see no prejudice suffered by the same in the cause of the trial as it cannot be said that he did not follow the trial since he was able to cross examine all the prosecution witnesses and to offer evidence in his defence and therefore this ground of Appeal as submitted by the Respondent has no merit and is dismissed.

18. On the issue of production of documents, PW3 laid the basis upon which he produced the and in compliance as submitted by the Respondent with Section 33 and 77 and of the *Evidence Act*. In this I find support in the case of Naomi Bonari Angasa v R [2018] eKLR where the Court stated that Section 77 of the *Evidence Act* allows a person other than the one who prepared a report such as P3 form to produce it provided the presumption of authenticity is met. Further since the Doctor was an expert witness the said evidence was tendered under the provisions of Section 48 of the *Evidence Act*.

19. It follows that this ground of Appeal has no merit as it was shown that the said witness was absent for reasons beyond the prosecutions control having retired from the Public service as supported by the Court of Appeal decision in *Joseph Bakei Kaswili v Republic 2017] eKLR*.

20. On whether the prosecution case was proved, it is clear that the Appellant was known to the Respondent being her step- father and therefore his identification could not have been mistaken. I have taken into account how the incidence was reported and would therefore dismiss the Appellant's defence that he was framed for declining to allow the complaint to get married as if the mother had a hand as alleged she would have been the one to report unlike in this cause where the complainant confided to her class mate who out of concern reported to the teacher.

21. The evidence on record shows that the age of the complainant and penetration were proved. I therefore find and hold that the prosecution proved its case against the Appellant and therefore his conviction was free of error. It follows that the Appeal against conviction has no merit and is dismissed.

22. On sentence, as submitted by the Respondent, the same remains at the sole discretion of the trial Court which an Appellant Court may only interfere with in rear case and subject to the condition that the same is excessively low or high and or that the Court did not take into consideration same material factors. In sentencing the Appellant, the trial Court had this to say:

> ' I have examined the penalty. The offence has weight (sic) the Sexual Offence Act provides for imprisonment of not less than twenty years. However, the 20 years is not mandatory and my hands are not tied. I hereby sentence the accused to serve 15 years in prison.'

23. It is clear that the Appellant was given a lesser sentence and having taken into account the relationship between the Appellant and the victim and the age of the same at the time of the commission of the offence and at the time of the trial, I decline to interfere with the sentence.

Disposition

24. By reason of the maters stated herein I find no merit on the Appeal herein which I dismiss both on conviction and sentence. The judgement of the lower Court is affirmed.

    And it is ordered.

25. The Appellant has right of Appeal.

DATED SIGNED AND DELIVERED AT MURANGA THIS 15th DAY OF MARCH 2023

J. WAKIAGA

JUDGE

In the presence of:

Ms. Carol Mutahi – Court Assistant.