JCA v Republic (Criminal Appeal 34 of 2020)
[2023] KEHC 23678 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23678 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 34 OF 2020

AC MRIMA, J

OCTOBER 19, 2023

BETWEEN

JCA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. V. Karanja (Senior Resident Magistrate) in Kitale Chief Magistrate's Court Sexual Offence No. 151 of 2019 delivered on 9th June, 2020)

JUDGMENT

Background:

1. JCA was charged in Kitale Chief Magistrates Criminal (S.O.) no 151 of 2019. He faced the charge of Defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. The particulars of the offence were that on 24th September, 2018 at [particulars withheld], the Appellant intentionally and unlawfully caused his genital organ namely penis to penetrate into the genital organ namely vagina of TCL, a child aged 16 years old.

2. The Appellant faced an alternative charge of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* whose particulars were that on 24th September, 2018 at [particulars withheld], the Appellant intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of TCL, a child aged 16 years old.

3. The accused denied the charges and was put on trial. After a full hearing, the Appellant was found guilty and convicted on the main charge of defilement and he was sentenced to serve a term of 10 years' imprisonment.

4. The Appellant was aggrieved by the conviction and sentence. He lodged an appeal which is under consideration in this judgment.

The Appeal:

5. In his Grounds of Appeal, the Appellant emphasized that the Prosecution failed to discharge their burden of proof to the required standard. He accused the trial Court of placing an unsafe conviction pegged on insufficient, contradictory and scanty evidence. He also averred that trial Court did not consider that he had just attained the age of 18 years and that his defence, which was cogent was not considered. He urged this Court to allow the appeal, quash the conviction and set aside the sentence imposed on him.

6. The Appellant argued his appeal by way of written submissions. He expounded on the grounds of appeal.

7. On the part of the prosecution, through its extensive written submissions, it contended that the conviction was safe and that all the ingredients of the offence had been proved as required in law. It urged that the appeal be dismissed.

8. The prosecution relied on various decisions in support of its case.

Analysis:

9. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono v Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v Republic* [2004] KLR 81.

10. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.

11. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and identification of the assailant.

12. This Court will deal with each of the issues in turn.

Age of the victim:

13. The age of a person may be proved in many ways. It may be by way of medical evidence or any official documentation for instance Certificate of Birth, Child Health and Nutrition Card, School registration documents, among others. The age may also be proved by evidence of the parents or persons who may positively testify to the fact.

14. In this case, the age of the complainant was not in issue. However, the mother of the complainant who testified as PW4 and the complainant herself testified that the complainant was 16 years old.

15. The complainant was, therefore, a child within the meaning ascribed to the term under the *Children's Act*.

Penetration:

16. Section 2(1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

17. This position was fortified in *Mark Oiruri Mose v R* (2013) eKLR when the Court of Appeal stated thus: -

> .... 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 penetration need not be deep inside the girl's organ.... (emphasis added).

18. Later the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v Republic* (2014) eKLR held as such on the aspect of penetration: -

> In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

19. The Appellant herein vehemently argued that the prosecution failed to establish penetration.

20. The issue of penetration was testified to by several witnesses. They are the complainant, PW1 one John Koima, a Clinical Officer attached at Kitale County Referral Hospital, PW3 (the father of the complainant) and PW4 (the mother of the complainant).

21. Evidence has it that the complainant was impregnated and gave birth on 30th May, 2019. That is congent evidence of penetration.

Identity of the perpetrator:

22. The identification of a perpetrator remains the most critical aspect in criminal cases. Whereas an offence may truly have been committed, it is a cardinal principle in law that the identity of the assailant must be firmly established more so to eradicate instances where innocent persons are convicted and sentenced thereby ending up serving sentences for offences they never committed. As Lord Denning once said it is better to acquit 10 guilty persons than to convict one innocent person. That is the gravity of identification.

23. The identification aspect in this matter was attested to by the complainant. The Complainant testified that on the fateful day as she went to fetch water in the river, she saw the Appellant chopping wood in a nearby forest. That, she went into the forest and on seeing her, the Appellant approached her and began touching her. He kissed her as well. He then removed his penis and removed her pants. They engaged in a sexual act for about 5 minutes as the complainant felt pain and bled.

24. The complainant never told her parents for fear of punishment. She was later found to be pregnant and that was when she disclosed what had happened with the Appellant. The complainant also disclosed to PW1 that she was in a sexual relationship with the Appellant since August 2018.

25. The Appellant denied any involvement in the alleged ordeal. He raised the issue of grudge due to a land dispute in his defence.

26. The evidence of the complainant was, hence, that of a single witness. It was on identification of the assailant by way of recognition.

27. Evidence by a sin *v Turnbull & Others* (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said: -

> .... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made....

28. The evidence by the single witness ordinarily calls for corroboration as so provided under Section 124 of the *Evidence Act*, Cap. 80 of the Laws of Kenya save for the evidence of a victim in sexual offences.

29. In giving guidance on how the issue of recognition ought to be distinguished from that of identification of a stranger, the Court of Appeal in *Peter Musau Mwanzia v Republic* (2008) eKLR, Court stated as follows: -

> We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

30. Further, the Court of Appeal in upholding the evidence of recognition at night in *Douglas Muthanwa Ntoribi v Republic* (2014) eKLR held as follows: -

> On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> > "I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."
>
> The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

31. Again, the Court of Appeal in Criminal Appeal no 274 and 275 of 2009 at Eldoret in *Peter Okee Omukaga & another v R* (unreported) had this to say on the evidence of recognition at night: -

> We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar

with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

32. The above Courts in essence emphasized on witnesses laying sound basis for recognizing alleged assailants. A Court must, therefore, be satisfied that the evidence on recognition is watertight so as not to cause an injustice to an innocent accused.

33. Again, this Court reiterates that the witnesses testified before the trial Court and the Court observed their demeanors. There were no adverse findings made on any of the witnesses. The Court also believed their evidence.

34. The complainant was quite forthright on the identity of the assailant. The incident occurred during day time. The Appellant lived in the neighbourhood. There is, therefore, no doubt that the complainant knew the Appellant quite well. Given the way the events occurred in the fateful day, this Court is satisfied that the complainant was able to recognize the assailant as the Appellant without error.

35. This Court has also considered the Appellant's defence. It raised the issue of grudge at the very tail-end of the proceedings. That, can only be regarded as an afterthought, just as the trial Court found it. The defence was rightly declined.

36. The trial Court was right in finding that the Appellant was positively identified by way of recognition.

37. There were also several other issues raised by the Appellant apart from the three ingredients of the offence. This Court will consider them.

38. One of them was the argument that a DNA examination was not undertaken. The answer to that is that such an examination is not necessary in proving the offence of defilement. The offence can be proved by other ways instead.

39. There was also the issue as to whether PW1 was duly registered as a Clinical Officer under the *Clinical Officers (Training, Registration and Licensing) Act* (Cap. 260) of the Laws of Kenya.

40. The response to the issue is that *Clinical Officers (Training, Registration and Licensing) Act* (Cap. 260) was repealed by the enactment of the *Clinical Officers (Training, Registration and Licensing) Act*, no 20 of 2017. The new legislation was assented to on 21st June, 2017.

41. The argument cannot, therefore, stand in law.

42. The Appellant also contended that there were inconsistencies in the evidence. As this Court has previously and severally stated, inconsistencies and discrepancies in the testimonies tendered by witnesses are bound to occur since people perceive things differently.

43. Therefore, unless the inconsistencies and discrepancies are so grave that they create doubt on the overall assessment of the evidence and that they cannot be reconciled, minor inconsistencies and discrepancies are not fatal to the prosecution's case.

44. The alleged inconsistencies and discrepancies in this matter were of minor character and the trial Court reconciled them well.

45. On the age of the Appellant, it was submitted that since he was 18 years old he ought to have been treated with leniency. The Appellant himself informed the Court before plea-taking that he was 18 years old. He had, hence, attained the age of majority. The Court will consider this issue under sentencing.

46. On the allegation that the trial Court failed to summon witnesses under Section 150 of the *Criminal Procedure Code*, the response is that the trial Court did not see any reason to do so. However, the Appellant remained at liberty to apply that any witness be summoned by the Court. The Appellant did not do so.

47. Further, the prosecution has a discretion to call any witnesses. (Section 143 of the *Evidence Act*). It is only in instances where crucial witnesses are not called and no plausible explanation is given when a Court may raise a red flag. (See *Bukenya & Others v Uganda* (1972) EA. 594, *Kingi v Republic* (1972) EA. 280 and *Nguku v Republic* (1985) KLR 412). The witnesses called in this case were sufficient to prove the offence.

48. There was also the contention that Section 153 of the *Evidence Act*, Cap. 80 of the Laws of Kenya was not complied with. The provision relates to witnesses being cross-examined on their previous statements relating to matters in question with a view of proving contradictions.

49. Clearly, the onus is on the Appellant to do so. The Appellant was given the statements by the witnesses who testified and remained at liberty to cross-examine any witness on their statements. This Court does not find any fault on the trial Court.

50. Having dealt with all issues and since none of them has impugned the prosecution's evidence, this Court finds that the Appellant was properly identified as the perpetrator and that he was rightly found guilty and properly convicted. As such, the appeal against the conviction is hereby dismissed.

Sentence:

51. The Appellant was sentenced to 10 years imprisonment. The Appellant tendered mitigations and were duly considered by the sentencing Court.

52. The Court in *Wanjema v Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

53. There is no doubt the offence is serious. It appears that the Appellant and complainant were in a sexual relationship. The Appellant was 18 years old while the complainant was 16 years old.

54. Given the age difference, this Court believes that both the Appellant and complainant ought to be treated in such a manner that they are properly guided on life issues.

55. The Appellant has been in prison since 2020 when he was convicted and sentenced to serve a jail term of 10 years. He submitted that he had learnt his lesson while behind bars and promised to be of good

character going forward. A Report by the Officer-in-Charge of the Prison Industry at Kitale Medium Prison dated 19th January, 2023 indicates that the Appellant was trained and qualified in carpentry and that he had fully reformed and is of high standard of discipline.

56. The Appellant was also in [Particulars withheld] Secondary School when he was convicted and sentenced. He is also desirous to go back to school.

57. On the basis of the foregoing, this Court is of the considered position that the Appellant ought to have been considered for a non-custodial sentence that would accord him another chance to mend his life and be guided on life issues.

58. This Court has, however, just been informed by the Prisons Department that the Appellant was released from prison. As such, this Court will bring the matter to an end.

Disposition:

59. Drawing from the above considerations, the following final orders of this Court issue: -

    a. The appeal on conviction is hereby dismissed.

    b. The appeal on sentence is successful. The Appellant is hereby set at liberty save for the terms under which he was released from prison.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 19TH DAY OF OCTOBER, 2023.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

No appearance for John Chumba Apoloywo, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Regina/Chemutai – Court Assistants.