REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO 106 OF 2019

LAWRENCE GITAU KARANU.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal against the conviction and sentence of the Chief Magistrate's Court at Thika (Hon. B. J. Bartoo) dated and delivered on 13th December, 2018 in Thika Chief Magistrate's Court Criminal Case No 2135 of 2014)

JUDGMENT

1. Lawrence Gitau Karanu, the Appellant, was charged before the Thika Chief Magistrates Court with the Offence of Conspiracy to commit a felony contrary to Section 393 of the Penal Code. The particulars of that offence were that:

> *Philip Mutua Muli and Lawrence Gitau Kanau (Karanu) on 24th May 2014 at Juja Farm area in Juja within Kiambu County Conspired together to commit a felony namely defilement.*

2. After trial the Appellant was convicted as charged and sentenced to serve 5 years' imprisonment. Being dissatisfied with that judgment the Appellant has appealed before this court against his conviction and sentence.

3. The prosecution presented before the trial court evidence that the Appellant was well known to the Complainant, a child of 13 years, since they were neighbours. The prosecution evidence was that at the home of the Complainant the family was running the business of a shop. On the night of 24th May 2014 the parents of the Complainant attended a church service at night, ordinarily referred to as *kesha*. At about Mid-night the Appellant who used to get items from that shop on credit knocked the gate of the homestead. The Complainant heard the Appellant, whom she referred to as Gitau, calling her mother. The complainant was then asleep in the same room with her younger brother. This is what the Complainant said:

> ***"We had slept. We were in one room in one bed. I heard our gate being knocked. I heard Gitau voice call out my mother's name. I knew his voice, he called mama Shiro. He said he wanted to be sold items. I left the house. The shop is adjacent to the shop (sic)".***

4. The Complainant narrated how she proceeded to sell rice to the Appellant. The Appellant returned to the homestead and sought that he be sold potatoes which the Complainant sold to him. On the third occasion the Appellant returned and knocked the door and on the Complainant opening the door the Appellant requested for a torch to enable him put his sheep inside his mother's homestead. The complainant refused to lend him the torch, because as she explained it belonged to her father. The complainant agreed to go with him to provide him with the light of torch. She stated that when the Appellant put the Sheep in his homestead the Appellant's co-accused Philip Mutua Muli accosted the Complainant and took her to the Appellant's house where the said Philip Mutua Muli defiled her. After that defilement both the Appellant and his co-accused took the Complainant to her home where her parent, who by then had returned home, were anxiously looking for her in the neighbor-hood.

5. The Appellant raised eleven grounds of appeal which seek this court's finding that the prosecution failed to adduce evidence or exhibits which connected the Appellant to the commission of the offence he was charged under; that the prosecution's evidence exonerated the Appellant; the investigating officer failed to visit the scene; that the Appellant was not identified bearing in mind the offence was alleged to have occurred at night; and that the trial court misdirected itself in finding there was conspiracy between the Appellant and his co-accused.

6. This is the first appellant court. This court is therefore duty bound to reconsider the evidence before the trial court, re- evaluate it however bearing in mind that this court neither saw nor heard the witnesses testify. A case that well discussed the duty of the first appellant court is **Jackson Kaio Kivuva –v- Penina Wanjiru Muchene (2019) e KLR**

> "14. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] eKLR, the Court of Appeal stated that;

> ***"[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"***

7. In submissions in support of those grounds the Appellant hinged his argument on his allegation that the trial court erred to have convicted him on the sole evidence of a minor without corroboration, that the court failed to conduct a satisfactory *voir dire* examination of that minor, and that the investigating officer failed to visit the scene.

8. It needs to be mentioned that the Appellant's co-accused appealed his conviction of the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act and the offence of Conspiracy to commit a felony contrary to Section 393 of the Penal Code. The said co-accused appeal before this court, being Criminal Appeal No 44 of 2019, was heard and determined by the judgment of this court dated 28th November 2019 whereby the trial court's conviction and sentence of Philip Mutua Muli, the Appellant's co-accused, was upheld. It follows that this court cannot re-visit that conviction and sentence. If what the Appellant sought was a re-visit of that conviction by arguing that there was no exhibit like of bed sheets to move defilement, that argument is disallowed by the fact the said conviction was upheld. But even if it was otherwise, there was indeed an exhibit of the complainant's torn skirt before the trial court. The Complainant stated that the skirt was torn by Philip Mutua Muli in the course of his defilement of her.

9. The Complainant was at the time of the commission of the offence 13 years old. The trial court correctly addressed the evidence of that minor and proceeded to conduct *voir dire* examination. In conducting that examination, the Complainant stated, amongst other answers:

> ***"I know meaning (sic) of oath. I know I am to say the truth."***

10. The Learned Trial Magistrate after conducting that examination recorded:

> ***"It was considered (sic) a voir dire examination. The court finds that the minor is intelligent, understand (sic) means (sic) of oath and she will give sworn evidence."***

11. The Court of Appeal considered the purpose of conducting ***voir dire*** examination in the case **Japheth Mwambire Mbitha –v- Republic (2019) e KLR** and stated:

> "*Voir dire* examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror (See **Duhaime, Lloyd**. "***Voir Dire* definition" Duhaime's Legal Dictionary**). With specific regard to the testimony of children, *voir dire* examination is essential to enable the court satisfy itself that the child is conscious of the truth. The purpose of *voir dire* was explained by this court in **Johnson Muiruri vs Republic [1983] KLR 445** as follows:
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> ***1. "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.***
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> ***2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.***
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> ***3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.***
>
> ***4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.***
>
> ***5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."***

12. In my view the proceedings of the trial court reveal the Complainant was examined on her understanding of oath and her duty of telling the truth. The questions of the trial court and the answers given by the Complainant clearly show that proper *voir dire* examination was conducted and thereafter the Complainant proceeded to testify under oath. There is no defect in that evidence as submitted by the Appellant.

13. Although the Appellant argued that he was convicted on uncorroborated evidence the Appellant failed to consider that he was charged with the offence of conspiracy to commit a felony namely defilement. In other wards the Appellant was charged with conspiracy to commit an offence involving a sexual offence. Such an offence is exempt under the proviso of Section 124 of the Evidence Act which provides that in a criminal case involving sexual offence the only evidence required is that of the alleged victim, in this case the Complainant. In addition, as stated herein above the Complainant's evidence was corroborated by the exhibit of a torn skirt and by the medical evidence adduced by the doctor. That evidence proved that there had been sexual assault and that the Complainant's hymen was perforated and there was injury to the Labia Minora, which was tender.

14. The fact that the investigating officer did not visit the scene nor collect evidence thereof does not dislodge the very cogent and clear evidence narrated by the Complainant. Nothing therefore turns on the submissions of the Appellant in that regard.

15. Having reconsidered the trial court's evidence, I am satisfied that the prosecution proved beyond reasonable doubt that the Appellant was guilty of the offence of conspiracy to commit defilement. The offence of Conspiracy is set out in Section 393 of the Penal Code as:

> *Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.*

16. In the case **Christopher Wafula Makohga -v- Republic (2014) e KLR** the court had this to say on what constitutes the offence of conspiracy.

> "11. In **Archibold: Writing on Criminal Pleadings, Evidence and Practice (Supra),** the learned writers observe at pages 2589 and 2590 that: -
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> > ***"The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons..... so long as a design rests in intention only, it is not indictable; there must be agreement..... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them."***

17. Further in a Canadian Case **R -v- Noseworthy, 2018 NLCA 69 (CanLII)** the court stated:

> *"Conspiracy is an agreement between two or more individuals to act together to achieve an unlawful object. In Papalia v. The Queen, 1979 CanLII 38 (SCC), [1979] 2 S.C.R. 256, 93 D.L.R. (3d) 161 the Supreme Court of Canada explained the offence at 276:*
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> ***…**On a charge of conspiracy, the agreement itself is the gist of the offence: …. The actus reus is the fact of agreement: …. The agreement reached by the co- conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme, while others may drop out. So long as there is a continuing, overall, dominant plan, there may be changes in methods of operation, personnel or victims without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy. …*
>
> *"[t]he Crown is simply required to prove a meeting of the minds with regard to a common design to do something unlawful, specifically the commission of an indictable offence."*

18. The dominant aspect of the offence of conspiracy is that there must be an agreement, a meeting of the mind. Was there proved to be a meeting of the mind of the Appellant and his co-accused? In my view the evidence of agreement is evident.

19. The Appellant first went to the Complainant's homestead at midnight on the night in question. It would seem that he did not know that the Complainant's mother was not at home because the Complainant responded to his calling of her mother, that is "mama Shiro." Since mama Shiro was not there the complainant answered his call and went to the shop in the homestead and sold him rice. The Appellant returned once again and purchased potatoes which the Complainant stated that he peeled at their homestead. The Appellant finally returned to request to borrow a torch which the Complainant was not willing to part with, because it belonged to her father. She chose to go with the Appellant in order that she did not have to give him the torch but agreed to shine it for him. It was as she did so that she was taken by the Appellant's co-accused who defiled her at the Appellant's house.

20. Although Appellant submitted that he was identified under difficult circumstances it needs to borne in mind that the Complainant had several interactions with the Appellant when she sold him items from the shop. These interactions were not denied by the Appellant. But perhaps more importantly is that this was a case of recognition. As it was stated in the case **R -v- Turnbull (1976) 3 ALL ER 549 by Lord Widgery C. J.**, recognition is more reliable than identification of a stranger. The complainant stated that she at first recognized the Appellant by his voice. The Appellant was a nearby neighbour and even ran a credit account at the shop. Further the Complainant accompanied the Appellant as he lured her to the place where his co-accused took her and defiled her. There is no doubt, considering that evidence, on the identity of the Appellant and further the actions of the Appellant of repeatedly going to the Complainant's house, that night, and finally luring her out of the house which led to her being taken by the Appellant's co-accused is evidence that he was recognized by the Complainant. But perhaps of most important the fact that she was defiled in the Appellant's house while the Appellant slept in his mother's house, thereby giving his co-accused opportunity to defile the Complainant, is clear evidence of conspiracy. It is clear that the Appellant and co-accused had agreed that the Appellant would lure the Complainant to where his co-accused was. There was evident meeting of the mind between the Appellant and his co-accused.

21. The Appellant's conviction of conspiracy by the trial court cannot be faulted.

22. On sentence, Section 393 of the Penal Code provides sentence of 7 years on conviction and if the offence the subject of the conspiracy provides for a lesser sentence that lesser sentence would be meted out on conviction. On conviction under Section 8 (1) (3) of the Sexual Offences Act the sentence thereof is not less than twenty years imprisonment. In this case the Appellant was sentenced on conviction of the offence of conspiracy to commit defilement to five years' imprisonment. I am guided by what was stated in the case of **Josiah Mutua Mutunga and another -v- Republic (2019) eKLR** when the court considered an appeal on sentence. In that case the court stated:

> "23. *The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in* **S vs.**

Malgas 2001 (1) SACR 469 (SCA) *at para 12 where it was held that:*

> ***"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"***

23. There is no basis presented by the Appellant which will lead this court to set aside the trial court's sentence. The trial court well considered the mitigation presented by the Appellant before sentence. On that ground the appeal against sentence is dismissed.

24. In the end there being no merit in the Appellant's appeal against conviction and sentence the Appellant appeal is dismissed.

25. Orders Accordingly.

SIGNED AND DELIVERED VIRTUALLY THIS 10th DAY OF DECEMBER 2020.

MARY KASANGO

JUDGE

10th December 2020

Before Justice Mary Kasango

C/A - Kevin

Appellant: - Present

For Appellant: – Mr. Odhiambo

For the State: – Mr. Kasyoka

COURT

Ruling virtually delivered in their presence.

MARY KASANGO

JUDGE