Koech v Republic (Criminal Appeal 39 of 2019)
[2025] KECA 419 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 419 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 39 OF 2019

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

FEBRUARY 28, 2025

BETWEEN

JOSEPHAT KIPROTICH KOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kericho (M. Ngugi, J.) dated 5th April 2019 and delivered on 9th April 2019 by G. Dulu, J. in HCCRA No. 10 of 2016)

JUDGMENT

1. The appellant Josphat Kiprotich Koech, was charged alongside David Kipkorir Langat, with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act. The particulars of the offence were that on 11th May 2014 in Kericho West District Kericho County, the appellant caused his penis to penetrate the vagina of MCS, a child aged 14 years. He also faced an alternative charge of committing an indecent act with a child contrary to section (11) of the Sexual Offences Act. The particulars of the offence were that on the same day and in the same place, the appellant touched the vagina of MCS, a child aged 14 years with his penis.

2. When the appellant was arraigned before the trial court, he pleaded not guilty to both counts. After a full trial, the appellant was convicted of the main charge of defilement and sentenced to serve 20 years' imprisonment. On appeal before the High Court, M. Ngugi, J. (as she then was) upheld the conviction and affirmed the sentence having found that his appeal lacked merit.

3. The appellant has now filed an appeal before this Court. He filed his notice of appeal dated 17th April 2019. When the appeal was heard on 27th November 2023 through the GoTo virtual link platform, the appellant was present and appeared in person while Senior Assistant Director of Public Prosecutions Mr. Omutelema represented the respondent.

4. The appellant relied on his undated memorandum of appeal, which raised 10 grounds challenging both the conviction and the sentence. In the grounds of appeal, the appellant argues that the charge was defective as the age stated in the charge sheet was not correct; that crucial witnesses who would have shed light on the events of the fateful night were not called; that the court ignored the evidence that the complainant had admitted that she had gone to Liten town the previous day and had sex with the co-accused and were caught in a lodging with the co-accused on the fateful night; that the medical evidence could not demonstrate who had caused the penetration in view of the admission that the complainant had sex with the co-accused the previous day and; that the 20 year sentence was harsh and excessive.

5. On its part, the respondent relied entirely on its written submissions and list and bundle of authorities both dated 3rd September 2024 to submit that the ingredients to a charge of defilement were proved beyond a shadow of doubt as follows: the age of the complainant established that she was 12 years old at the time of the commission of the offence from the testimony of PW1 and the clinic card adduced in evidence. On the aspect of penetration, the respondent relied on the evidence of PW1, PW2, PW4 and PW5 to argue that the complainant had been defiled. Regarding the identification of the perpetrator, learned counsel submitted that the evidence of PW1 was corroborated with the testimonies of PW2 and PW3 as to positively identify the appellant as the perpetrator of the offence.

6. It was further argued that all the witnesses were credible and corroborated their evidence as to draw an inference that the appellant committed the offence. Insofar as the evidence of PW1 was concerned, the respondent advanced that though the trial court declared her a hostile witness, her evidence was replete with probative value as it was corroborated.

7. The respondent continued that all crucial witnesses were called to the stand, contrary to the appellant's allegations. That his defence was ably considered and failed to cast doubt upon the evidence presented by the respondent. In the circumstances, the respondent urged this Court to sustain the conviction and affirm the sentence of 20 years' imprisonment which was lawful.

8. Our duty as a second appellate court is confined to consideration of matters of law as provided in section 361 of the Criminal Procedure Code. This Court in Karingo vs. Republic [1982] KLR 213 held:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja vs. R (1956) 17 EACA 146)."

9. The facts as established from the evidence of the prosecution are as follows: 14-year-old MCS, the complainant and PW1 a class six student at [Particulars Withheld] primary school stated that she was born in the year 2000. She testified that on 11th May 2014, she left school at 6: 00 p.m. She proceeded to Sigowet trading center at 7:00 p.m. where she met one David Kipkorir Langat, the appellant's co-accused person, and had tea and a maandazi in a hotel. Thereafter, the said David Kipkorir Langat informed the complainant that he had booked a room in a local lodging. They proceeded to the lodging and obtained access to a room. No sooner had they entered the room than were they arrested by members of the public. Part of the rescue team included the appellant and PW2.

10. The appellant escorted the complainant to Sondu police station where the said David Kipkorir Langat was accused of taking the minor complainant to the lodging. The appellant, alias Kenya, was thereafter asked to escort the complainant to her home. It was the first time that they had met. Instead, however,

the appellant took the complainant to his home. However, according to the complainant, on arrival, the house was locked, and in the circumstances, they proceeded to the appellant's friend's abode.

11. Once inside, the appellant took off his clothes and those of the complainant. He then proceeded to sexually assault her into the wee hours of the night. During the ordeal, the appellant threatened to kill the complainant if she dared to raise an alarm. The appellant would later be called through his mobile phone. The caller sought to establish the whereabouts of the complainant.

12. At around 2:00 a.m., the complainant pleaded with the appellant to take her to David's house. They were met by several members of the public including one Amos and Benson Kiplagat. They were arrested and taken to the DO's office where they stayed till morning. That morning, the complainant was taken to Sigowet Health Centre for treatment. A physical examination of her private parts revealed no presence of semen. She was then given drugs for her treatment. Later on, she went to Sondu police station where she recorded her statement. Thereafter, she was taken to Sondu Hospital for a subsequent medical examination.

13. PW2 Benson Kiplagat testified that on the material date at 9:00 a.m., he saw David Kipkorir Langat walk into the hotel with the complainant. He was taking tea with the appellant who is his crony. They were part of the team that confronted and arrested David Kipkorir Langat for taking the complainant to a lodging. According to him, the appellant was holding the complainant's hand. On reaching the station they realized that the girl was not with them. His evidence recounted that both the complainant and the appellant had disappeared. On realizing this, they tried to call the appellant to establish his whereabouts. The appellant was evasive but promised to take the complainant to the police station.

14. PW3 APC Joel Atuti Mokamo, attached to Sigowet police station, testified that David Kipkorir Langat was brought to the police station by members of the public at 9:30 p.m. on 11th May 2014 for being found in the company of the minor complainant in a lodging. Equally, the appellant was escorted to that police station by members of the public the following day and he was accused of defiling the complainant.

15. PW4 Inspector James Agutu of Sigowet police station, confirmed that the appellant and David Kipkorir Langat were escorted to Sigowet police station by members of the public on the morning of 12th May 2014 and the night of 11th May 2014 respectively. He also confirmed that the said David Kipkorir Langat was accused of having a minor in a lodging while the appellant was accused of defiling the said minor. Finally, he also testified that upon the arrest of David Kipkorir Langat, the appellant had been requested to escort the complainant to the police station but instead disappeared with her during that night.

16. PW5 Willy Kitur, a registered clinical officer working at Sondu Health Centre, produced a P.3 form dated 13th May 2014 in evidence [PExh.3]. His evidence was that the complainant was examined on 13th May 2014 at their facility with a history of sexual assault. That the complainant was treated on 12th May 2014 at Sigowet sub-district Hospital. PW6 CPL (W) Maryline Chelangat produced the complainant's clinic card in evidence.

17. PW5's physical examination of the complainant's private parts revealed that her labia majora was hyperemic, red and swollen. The complainant felt pain when she was touched. There was no bleeding or any discharge seen. In his opinion, there was evidence of penetration.

18. Upon evaluating the prosecution evidence, the trial court found that a prima facie case had been established against the appellant. He was placed on his defence. His defence was that he was arrested at 6:00 a.m. for an offence he did not commit.

19. In order to sustain a conviction, the following essential ingredients to a charge of defilement must be proved by the prosecution beyond reasonable doubt: the age of the complainant, the aspect of penetration and a positive identification of the perpetrator of the offence. Bearing in mind that this Court will not interfere with concurrent findings of fact arrived at by the two courts below unless the conclusions were based on no evidence, we now turn to determine whether the conviction was safe.

20. On the age of the complainant, the trial court relied on an age assessment report. We confirm that the same was not adduced in evidence. Nonetheless, the trial court found that the complainant was a minor. Similar findings were made by the High Court which established that based on the evidence, the complainant was a child. We find that the age of the complainant was established from the P3 form, the complainant's clinic card and the testimony of the complainant stating that she was aged 14 years. We thus find that the complainant was a minor within the meaning of a child as defined in section 2 of the Children's Act.

21. On penetration, the complainant and PW5 testified that the appellant inserted his penis into the complainant's vagina. Relying on the P3 form, the trial court found that penetration had been established. Those findings were affirmed by the High Court. As already stated, this is a second appeal and it is confined to points of law only by dint of section 361(1)(a) of the Criminal Procedure Code. We can only interfere with the findings of facts if we establish that there was no evidence on which the trial court could have sustained a conviction or the courts below are shown to have acted on wrong principles in making the findings. (See David Njoroge Macharia vs. Republic [2011] eKLR).

22. The main ground raised by the appellant against his conviction is the contradictory nature of the evidence and whether the first appellate court properly evaluated the evidence. In his quest to prove the said ground, the appellant invited this Court to establish whether he was the perpetrator of the offence. To answer this question and whether the evidence adduced rendered his conviction safe, it is necessary to revisit that evidence.

23. According to the complainant, on the material date, she was picked by the second accused person called David, the appellant's co-accused at around 6:00 p.m. and was aboard a boda boda. That they both hailed from the town of Mindilitwet. He requested her to accompany him to Sigowet trading center.

    After taking tea, David took her to a room that was at the back of the lodging where they were arrested moments later. According to the complainant, they did not partake in any activity.

24. We find the evidence of the complainant full of contradictions and we shall highlight a few incidents. In her evidence in chief, she says that she did not know what takes place a lodging. In the next breath she says that previously, they had gone to a lodging with David in a trading center known as Liten and they had sex. She continued as follows: "We were at home. He came and asked that we go to Litien, it was a lodging..." According to her, this incident was reported to her mother but no action was taken against David. In her further evidence, she states that PW2 was present when the appellant was arrested. However, in his evidence, PW2 categorically stated that he did not know how the appellant was arrested but only knew that he surrendered. We observe that this is a case where the complainant was caught in a lodging with two men on the same night; one arrested in a lodging and the other arrested by the roadside.

25. It is on record that the incident occurred on 11th May 2014. The evidence of the investigating officer was that the appellant was arrested by the members of the public and taken to the police station. No member of the public was called as a witness to corroborate this evidence and as already pointed out, the evidence of the complainant and PW2 is contradictory. Insofar as the medical evidence is concerned, the evidence before us is that the complainant was taken to Sigowet Sub-District Hospital on 12th May

2014. However, the report that was produced was that from Sondu Health Center recorded on 13th May 2014. From the record before us, it is not clear why the primary examining doctor was not called and why she was taken to another Hospital the following day.

26. Section 124 of the Evidence Act provides that the evidence of a single identifying witness shall not sustain a conviction save in sexual offences where it is established that the victim was being truthful. The said section provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> > Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

27. It is clear that whereas the evidence of the complainant is enough to sustain a conviction, the court must be satisfied, for reasons to be recorded, that the complainant is a truthful witness. From the evidence on record, the complainant cannot be regarded as a truthful witness. Even if one were to take the medical evidence as corroborative evidence, the evidence in this case is diluted by the fact the complainant was in a lodging with the co-accused who, in her own admission, had previous sexual escapades with her. We note that the appellant's main ground of appeal is that the first appellate court did not evaluate the evidence on record appropriately. Our analysis of the evidence casts doubts as to whether the appellant is guilty of the offence that he was charged with and whether all the ingredients of the offence of defilement were proved beyond reasonable doubt. In such a scenario, the appellant is entitled to the benefit of doubt as this is not a safe conviction.

28. We therefore find that the evidence that was adduced could not sustain a conviction. Accordingly, we allow the appeal, quash the conviction and set aside the sentence meted upon the appellant. The appellant is hereby set forth at liberty unless otherwise lawfully held. The appeal wholly succeeds.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF FEBRUARY, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR