Bokose v Republic (Criminal Appeal 198 of 2019)
[2025] KECA 640 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KECA 640 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 198 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

APRIL 4, 2025

BETWEEN

PHILIP KIMTAI BOKOSE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma (Kiarie, J.) dated 4th October, 2018inHCCRA No. 111 of 2017)

JUDGMENT

1. The appellant, Philip Kimutai Bokose, was the accused person in the trial before the Senior Principal Magistrate's Court at Kimilili in Criminal Case No. 1 of 2017. He was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between the month of July 2016 and 28th day of December, 2016, at different places within different counties, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of E.C.T.[1], a child aged 17 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence as to time, place and victim of the crime were the same as those in the principal charge save for the conduct charged.

2. In addition, the appellant faced a second count of assault causing actual bodily harm contrary to section 251 of the *Penal Code*. The particulars of the offence were that on the 29th day of December, 2016, at Chemoge location in Mt. Elgon Sub County, within Bungoma County, the appellant assaulted E.C.T., thereby occasioning her actual bodily harm.

3. The appellant pleaded not guilty to both charges and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to serve fifteen (15) years imprisonment on the first count. For the second count, the learned trial magistrate

found the appellant guilty but discharged him under section 35(1) of the *Criminal Procedure Code* (CPC).

4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

5. The High Court (K.W. Kiarie, J.) dismissed the appeal, upheld the conviction and confirmed the sentence in a judgment dated 4th October, 2018.

6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised seven (7) grounds in his Memorandum of Appeal, which reproduced verbatim are that:

    1. The appellant did not plead guilty to the charges.

    2. The learned judge erred in law and fact when he dismissed the appellant's appeal without considering the laymanship of the appellant towards the law.

    3. The first appellate court judge failed in law and fact by failing to make corrections on the mistakes done by the learned trial magistrate.

    4. The first appellate court judge failed in law and fact by convicting the appellant when there was no corroborative evidence of penetration circumstances or otherwise.

    5. The learned trial magistrate erred in law and fact when he convicted the appellant without taking into consideration the conduct of the complainant which pointed to the contrary.

    6. The learned trial magistrate erred in law and fact when he failed to consider the alibi of the appellant.

    7. This appeal be considered as duly filed and may this court re-evaluate the whole evidence or make record and make an independent conclusion.

7. A summary of the evidence that emerged at the trial through four (4) prosecution witnesses, and which was subjected to a fresh review and scrutiny by the High Court, is as follows.

8. At the time of the incident, PW1, the complainant, was a form 2 student at [Particulars Withheld] High School but was having challenges paying school fees. PW1 recalled that on 17th July, 2016, while she was on half term school break, she met the appellant on the road at Chemonge. The appellant promised to pay her school fees. Seemingly in exchange, the complainant agreed to accompany the appellant to his aunt's place in Eldoret. Upon arrival in Eldoret, the appellant's aunt gave them a room which they shared. They had sex that night. In her testimony, the complainant was explicit that she meant that the appellant inserted his penis into her vagina.

9. The next day, the appellant travelled leaving the complainant in his aunt's place. He returned after one week, whereupon he took the complainant to Saboti and rented a house. They stayed in Saboti until October 2016. Thereafter, the appellant took PW1 to his home in Chemonge where they stayed until 29th December, 2016.

10. On 29th December, 2016, the complainant inquired about her returning back to school. The appellant got furious and assaulted her. Luckily, she managed to escape when she screamed and the appellant's relatives showed up at the house. That night, the appellant slept in the forest. The following day she reported the matter at Kapsokwony Police Station. The police called her mother who went for her, recorded a statement and took her to hospital where she was examined. She was found to be four

(4) months pregnant. Later, her mother went back home with her. During cross-examination by the appellant, the appellant testified that the pregnancy ended in a miscarriage.

11. PW2 was RC, the complainant's mother. She testified that the complainant disappeared in July 2016, upon which she looked for her for a month, in vain. Two months later, the appellant called and informed her that she had married the complainant. She asked him if he knew that she was a student, but he did not respond. She then reported the matter at Kapsokwony Police Station, where she was told to wait until they traced the complainant. On 30th December, 2016, she got a call from the police that the complainant had been found and that she had been assaulted. She went to the police station where she found the complainant who narrated what had happened. Afterwards, she took the complainant to hospital; and the medical examination revealed that she had been injured; and was also pregnant.

12. PW3, Godfrey Wanjala Khaemba, a clinical officer at Mt. Elgon Hospital, attended to the complainant when she was taken to the hospital. He testified that he examined PW1 and found that she had: an inflammation on the right side of the skull and neck;

    pain on the chest wall; and a wound on the left thigh. He assessed the degree of injuries as harm and concluded that they were caused by a blunt object. He also testified that vaginal examination revealed that there were no lacerations. However, the hymen was absent and there was a whitish discharge. A pregnancy test revealed that she was pregnant. Ultimately, Mr. Khaemba concluded that PW1 had been injured and defiled.

13. PW4, Corporal Raphael Kaloki, was the investigating officer in the case. He gave formal testimony about the report made by PW2 on the disappearance of her daughter around 5th July, 2016, and the investigations that led to the arrest and charging of the appellant. He testified that they got a tipoff that the appellant was staying with the complainant and that they had differed. The complainant narrated what had happened and he recorded her statement. Thereafter, she was taken to hospital.

14. Upon being placed on his defence, the appellant gave sworn testimony and did not call any witnesses. He denied the charges against him; and further told the court that he neither knew the complainant nor cohabited with her. He claimed that he had a wife by the name, Annet Cherop, and that he met the complainant for the first time in court. The appellant narrated that he was arrested on 30th December, 2016, when he went to PW2's restaurant to demand Ksh. 22,275.00/= which she owed him. It was his testimony that during his arrest, the police told him that they had been looking for him.

15. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned Prosecution Counsel, Mr. Oyiembo appeared for the respondent. Both parties relied on their submissions and opted not to orally highlight them.

16. The appellant did not specifically argue his grounds of appeal as listed. However, the totality of his submissions pointed to three main grounds, which are that: the prosecution evidence failed to meet the required threshold of proof beyond reasonable doubt; the evidence produced at the trial court was contradictory and/or had discrepancies; and, the defence evidence was not rebutted by the prosecution.

17. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In Samuel Warui Karimi vs. Republic [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are

based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong v R, [1984] KLR 611."

18. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions.

19. The first ground taken up by the appellant is a due process one. It is that his constitutional rights were violated because the trial court did not take into account his "laymanship" and assign him a lawyer as guaranteed by *the Constitution*.

20. Article 50(2)(h) of *the Constitution* stipulates that an accused has the right "to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result." As David Njoroge Macharia vs. Republic [2011] eKLR held, this provision does not automatically grant state-funded legal representation for all offences but is contingent upon the potential for substantial injustice.

21. The position presently obtaining in Kenya is that an accused person is only entitled to legal representation provided by the State where he can demonstrate, in the unique circumstances of his case, that he cannot afford an advocate, and that he would suffer substantial injustice if he is not represented by counsel in his case. The potential penalty upon conviction is one of the factors that the court considers in determining if substantial injustice would be occasioned if a State-appointed counsel is not provided at trial. The other factors include the accused person's own circumstances such as his ability to understand the nature of the case he is facing. In the present case, there is nothing on the record that demonstrates that the appellant had any difficulties in understanding the charges he was facing. In any event, we note that the appellant has raised this issue for the first time in this appeal, and has, therefore, failed to preserve it for appeal by failing to raise it at the High Court.

22. Next, the appellant contended that it was impossible to know whether the complainant was a student as her physical appearance depicted that she was anatomically and physiologically mature. According to the appellant, he was cheated into believing that the complainant was an adult and he could not have known that she was a student who did not wish to get married. We merely note, by way of dismissing this argument, that the appellant never raised this as a defence during trial or even at the first appellate court. It is an afterthought, one that cannot save him at this point.

23. The appellant also contended that the prosecution evidence was mired in contradictions, discrepancies and incredulous narratives. For example, he argued that it would have been impossible for him to move around with the minor in broad daylight as claimed; that the complainant had claimed that he had promised to pay school fees for her yet she also said she had dropped out of school; that no evidence of pregnancy was availed; and that the complainant had claimed she was on half-term break yet half-term dates in the school calender never fall in July.

24. We note that these points raised by the appellant are not strictly about contradictions but about the credulity of the complainant's testimony. We must point out, as the respondent correctly pointed out, that these are complaints about factual findings over which the two courts below had concurrent findings. The trial court which heard the testimony of the complainant believed her to be telling the truth and the High Court, upon reevaluation of the evidence affirmed the finding. As a second appellate court we do not have the remit to assess the credibility or credulity of the factual assertions made at trial.

25. The appellant also complains that his alibi defence was not considered by the trial court and the High Court. As the respondent points out, this is a misleading claim. In his testimony before the trial court,

the appellant did not raise alibi as a defence. The charge was that he had eloped with the complainant between July, 2016 and 28th December, 2016, and on diverse dates between those dates defiled her. The appellant's defence was that he was at Kapsokwony market near the police station on 30th December, 2016 where he had gone to demand his money from PW2. This is not an alibi because it offers no answer respecting the period covered by the charge.

26. Ultimately, the appellant globally argues that the offence was not proved to the required standards. In particular, he contests that penetration was proved beyond reasonable doubt. In particular,he complains that there was no DNA evidence that showed that the pregnancy was his.

27. We observe that penetration was proved through a combination of the oral testimony of the complainant; the medical evidence produced by PW3; and the circumstantial evidence by PW2. The complainant was explicit that on different dates while they lived together, the appellant had unprotected sex with her; and that, in fact, she became pregnant. Unfortunately, she had a miscarriage. Her testimony is corroborated by the medical evidence of PW3 who testified that upon examination, he found the complainant to be pregnant; and that her hymen was missing. PW3 produced a P3 form and Treatment notes which are part of the court record. On the other hand, PW2 gave evidence confirming that the complainant disappeared from home on the dates covered by the charge sheet. In our view, all the above was sufficient to justify a conclusion by the two courts below that penetration was proved. As there is nothing perverse about that finding given the evidence available, we pay homage to those concurrent findings of fact by the two courts below.

28. Thus, we fully agree with the findings of the trial court that the prosecution proved their case beyond reasonable doubt.

29. The appellant did not appeal against sentence. That is just as well since he was sentenced to fifteen (15) years imprisonment – the minimum possible sentence under section 8(4) of the *Sexual Offences Act* under which he was charged.

30. The upshot is that the appellant's appeal is wholly without merit and it is hereby dismissed.

31. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF APRIL, 2025.

HANNAH OKWENGU

JUDGE OF APPEAL

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H. A. OMONDI

JUDGE OF APPEAL

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JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR