Salim v Republic (Criminal Appeal 66 of 2020)
[2024] KECA 113 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 113 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 66 OF 2020

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

FEBRUARY 9, 2024

BETWEEN

SALIM KATANA SALIM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Malindi delivered by R. Nyakundi, J. on 23rd October, 2019 In Cr. Appeal No. 68 of 2018)

JUDGMENT

1. This is a second appeal lodged by Salim Katana Salim, the Appellant herein. He seeks to have his conviction by the trial Court and upheld by the High Court quashed and the sentence of 15 years life imprisonment set aside. The Appellant was charged before the Senior Principal Magistrate's Court at Kilifi in Criminal Case No. 419 of 2016 with the offence of defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 (hereinafter SOA). The particulars of the offences being that on 26th day of October 2016 at [Particulars Withheld] within Kilifi County intentionally and unlawfully caused his penis to penetrate the vagina of HJ a child aged 16 years. He was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) if the SOA, the particulars of the offence being that on 26th day of October 2016 at [Particulars Withheld] within Kilifi County intentionally touched the vagina of HJ a child aged 16 years.

2. On 22nd November, 2016 the Appellant pleaded not guilty to the two counts of offences. The Appellant was released on a bond of Kshs. 100,000/= with surety. PW1 testified that on 15th October, 2016 she had gone to her grandfather's place in [Particulars Withheld] where she met the Appellant who was her madrassa teacher who kidnapped her as she was going back to [Particulars Withheld] from school using threats. PW1 accompanied the Appellant to his home in Tezo. The Appellant defiled her twice and released her in the morning after warning her not to tell anyone lest she would be cursed

"atanisomea dua" so that she can run mad. It was PW1 testimony that when she went back to her grandfather house, she was beaten until she revealed that it was the Appellant who defiled her. The grandfather took her to the police station to record a statement.

3. PW2 MK, PW1's mother stated that on 25th October, 2015 PW1 went to visit her grandfather. That on 26th October, 2016 she heard from F, PW1's sister that PW1 was not at school. PW2 stated that later PW1 told her about the incident.

4. PW3 SK, PW1's grandfather confirmed that PW1 went to his home on 25th October, 2016 at [Particulars Withheld] and that on 26th October, 2016, she told him that she was going to Majaoni to pick her report. That she returned to him on 27th October, 2016 and told him that the Appellant had kidnapped her and threatened to curse her if she did not go to sleep at his place. He stated that PW1 was taken for treatment and found to have contracted a venereal disease. He stated that he did not have any grudge with the Appellant whom he knew.

5. PW4, Dr. Noorein a medical Officer at Kilifi County Hospital produced the P3 Form on PW1that was prepared by Dr.Daisy Juma whom he worked with. According to PW4, the P3 Form established that the hymen was not intact and that there was a whitish discharge seen on the vulva. That the age of the injury was months, caused by a blunt weapon. PW4 also produced a PRC Form filed by one Sidi Samuel, after examining PW1.

6. In his defence, the Appellant submitted that he is a Madrassa teacher and on 23rd February, 2016 he was arrested and taken to Kilifi Police station for the charge of defilement. The Appellant stated that he worked in Mavueni but resides in Gede. According to the Appellant, on 23rd at around 4.00 PM he was at the mosque with elders when four police officers came and arrested him. He said that the next day he was arraigned in court where he denied the charges. He said that he never knew PW1 and her family and that he had never taught PW1 in madrassa. DW2, BBA said that on 23rd November, 2016, he sat together with the Appellant until 5.00 pm and that he saw nothing happening that day.

7. In her judgment, the learned trial Magistrate found that the Clinic Card (P-Exhibit 3) established the age of PW1 as 16 years having been born on 9th September, 2000. On the issue of penetration it was held that the P3 Form established that the hymen was broken. Regarding identification, she found that PW1 knew the Appellant as her madrassa teacher and hence she positively identified him.

   According to the learned trial Magistrate, the Appellant did not specifically deny committing the offence and that DW2 confirmed that he did not see the Appellant on the material day of the offence. The learned trial Magistrate found that the Appellant was guilty of the charge of defilement and sentenced him to 15 years imprisonment.

8. Aggrieved by the judgment, the Appellant appealed before the Malindi High Court. The grounds of appeal were that:

   1. The learned trial magistrate grossly erred in both Law and facts by failing to consider a defective plea taking procedure in that the court coram lacked an interpreter throughout the trail in breach of Article 50 (2) (m) of *the constitution* of Kenya 2010 rendering the resultant trial a mistrial and a nullity of the entire case;

   2. The learned trial magistrate erred in both Law and facts by failing to consider that the demeanor of the prosecution witnesses was not recorded anywhere in the trial proceedings in contravention of section 199 of the CPC (cap) Laws of Kenya;

3. The learned trial magistrate erred in Law and facts by failing to consider that the prosecution did not prove their case beyond reasonable doubt in that there was no investigation officer during the trial

4. That the Learned trial magistrate erred in law and facts lay failing to adequately consider his ALIBI defense

9. The learned Judge of the High Court (R. Nyakundi, J.) was not convinced that the Appellant's defence of alibi had dislodged the prosecution evidence. The learned Judge found that the Appellant was accorded fair trial during plea taking and throughout the trial. He was satisfied that PW1 knew the Appellant before the incident and therefore identification was positive. He also found that all the ingredients of the offence were proved including penetration and the age of PW1.

10. The Appellant is dissatisfied with the decision hence appealed before this Court. The grounds on the memorandum of appeal were as follows:

    1. That the learned judge erred in law by upholding my conviction and by failing to consider no original or certified copies of the clinic card as was produced in evidence by PW5 in compliance with section 66 and 64 of the *evidence act*.

    2. That the learned High Court Judge erred in law by upholding my conviction and by failing to consider sharp contradictions by the prosecution, specifically the first statement made by the complainant (PWl) and the testimony she gave during the trial in breach of section 163 (i) (e) of the *Evidence Act*.

    3. That the learned High Court Judge erred in law by upholding my conviction and by failing to consider no cogent evidence was adduced by the prosecution to connect I the appellant to the commission of the alleged offence in that no DNA test was conducted as per the provisions of section 36(i) of the *Sexual Offences Act* No. 3 of 2006 rendering the conviction of the appellant unsafe and unsustainable.

    4. That the learned Judge erred in law by upholding my conviction and by failing to consider that the legal provision providing for a mandatory minimum sentence under section 8(4) of the *Sexual Offences Act* No. 3 of 2006, conflicts, contradicts and violates section 216 and 329 of *the constitution* of Kenya 2010 (sic) which denies the judicial officers their legitimate jurisdiction to exercise discretion in sentencing thereby being unconstitutional.

11. The appeal was heard virtually before us on the 25th July 2023 whereby the Appellant appeared in person from Manyani Maximum Prison where he was serving his sentence, and learned Senior Public Prosecution Counsel Mr. Alex Gituma appeared for the State. Both the Appellant and Mr. Gituma relied on their written submissions, which they did not wish to highlight before us.

12. We have considered the appeal and the submissions. As this is a second appeal, our mandate is limited to considering matters of law. In that regard, in the case of Peter Osanya vs. Republic [2016] eKLR this Court stated:

> " Section 361(1)(a) of the Criminal Procedure Code limits our jurisdiction in second appeals like this one to only matters of law. That provision has received judicial interpretation in numerous decisions of this Court such as Chemogong V. Republic [1984] KLR 611, Ogeto V Republic [2004] KLR 14 And Koingo V Republic [1982) KLR 213 amongst others. In the latter case, it was pronounced:-

> "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 it is based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karasi S/O Karanja V. R. [1956] 17 E.A.C.A 146)" [Emphasis added]

13. Therefore, the question in this appeal is whether there was evidence based on which the trial court convicted the appellant and based on which the High Court upheld that conviction. In that regard, the prosecution had the burden to prove age of the complainant (PW1), penetration, and identification of the perpetrator to sustain a conviction.

14. A cursory look at the grounds of appeal raised before the High Court and before this Court shows that grounds 1, 2 and 4 raised before us were not raised or urged before the High Court. Ground 1 raised issue with failure to adduce the original Clinic Cards in support of proof of PW1's age; while ground 2 dealt with failure to carry out DNA examination; and ground 4 challenges the taking away of the Court's power to exercise discretion in sentencing by the penal section of the SOA, in particular Section 8(4), that was contrary to *the Constitution*.

15. This Court, differently constituted, in John Kariuki Gikonyo v Republic [2019] eKLR cited with approval Alfayo Gombe Okello Republic [2010] eKLR Criminal Appeal No. 203 of 2009; which when faced with a similar issue held as follows:

> "....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

16. The Court continued to observe as follows:

> "(18) In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal."

17. Consequently, the questions that linger for our determination in this appeal are twofold; whether the prosecution proved its case and whether the alibi defence was considered.

18. The Appellant in his submissions made no mention of the issue on alibi defence and the same is considered abandoned, as we are unable to know what issues he intended to raise. In regards to the prosecution case, the Appellant urged that there was failure by the prosecution to avail the investigation officer who was a crucial witness in this case. That the same denied him the right to cross- examine the investigation officer on the much he knew about the alleged defilement case, and how he came to the conclusion that he should be charged with the two offences. The Appellant contended that his rights to a fair trial was thus violated in breach of Article 25 (c) and 50 (2) of *the Constitution* of Kenya being an absolute right; which he urged is non-derogable and cannot be withdrawn from him. The Appellant relied on the case of Bukenya .vs. Uganda (1972) E.A.C.A- 549, for the proportion that "the prosecution is duty bound to make available witnesses that are necessary to establish the truth even if their evidence may be inconsistence to its case othe1wise failure to do so may in appropriate case lead to an inference, that the evidence of uncalled witness would have tendered to be adverse to the prosecution." He also relied on the case of Stamulus Opiyo .vs. Republic; Criminal Appeal Number 711 of 2003 where the High Court faced with a similar circumstance allowed the appeal.

19. The submissions by the state that were signed by Ms Nyawinda started off by cautioning that unless it was shown that the two Courts below considered matters it ought not to have, or failed to consider important matters of fact, this Court sitting as a second appellate Court should only consider matters of law. For that proposition, reliance was placed on this Court's decision in Moses Nato Raphael vs Republic (2015) eKLR.

20. In regards to the alleged contradictions in the evidence of PW1, the Respondent submitted that the prosecution called cogent evidence that was not contradictory, and that it withstood rigorous cross-examination by the defence. Reliance was placed on Twehangane Alfred vs Uganda (Cr.App No.139 of 2001(2003) UGCA for the proposition that not every contradiction warrants rejection of evidence. Counsel submitted that DNA testing provided under Section 36 of the *Sexual Offences Act* was not in nature mandatory. For that proposition, he relied on Evans Wamalwa Simiyu vs Republic [2016] eKLR, Aml vs Republic [2012] eKLR and Robert Mutungi Mumbi vs Republic MLD CA CRA No.52 of 2014. He further submitted that pursuant to Section 124 of the *Evidence Act*, as long as the Court believed the minor witness to be speaking the truth, lack of DNA could not invalidate the trial Court's findings.

21. We have considered the judgment of the learned Judge and find that he was alive to the evidential burden and the standard of proof the prosecution was required to attain in order to prove the case against the Appellant. He set out the ingredients of the offence the prosecution needed to establish as the age of the child complainant, that penetration occurred and that the Appellant was proved to be the perpetrator of the offence.

22. Regarding the proof of the age of PW1, the learned Judge observed:

> "The age of the Complainant as per the charge sheet was indicated as 16 years old. The prosecution produced before the trial court, evidence in form of Child Health Card which is marked as Plaintiff Exhibit- 3 which indicates that the complainant was born on 9/9/2000. As such, the complainant sixteen years old at the time the offence was committed. Child Health Card being one of the documents which contains prima facie evidence of age, I therefore find that the age was proved beyond reasonable doubt."

23. On the issue of penetration, the learned Judge cited section 2 of the SOA as to what constitutes penetration thus: "the partial or complete insertion of the genital organ of a person into the genital organ of another person." He then placed reliance on the several cases. The case of Mark Oiruru Mose vs Republic (2013) eKLR, where the Court of Appeal enunciated that: "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." And the Court of Appeal decision in Erick Onyango Ondeng v. R (2014) eKLR which spoke on the aspect of penetration as an intrinsic ingredient of defilement thus: "In Sexual Offences, the slightest penetration of a female sex organ by a male organ is sufficient to constitute the offence. It is not necessary that the hymen be raptured"

24. The learned Judge then concluded on that issue as follows:

> "In the instant case, the penetration claims that the Appellant sexually manipulated her by threatening with curse. The PRC filled by Dr. Sidi Samuel and presented before Court by Dr. Noorein a medical officer at Kilifi County Hospital. He also presented a P3 form filled by Dr. Daisy Juma. The P3 form indicates that upon examination of the genitalia, the complainant's hymen was not intact, she had whitish discharge on vulva, treatment given was for STI and degree of injury was harm. The age of injury was considered to have

happened in months and the probable weapon type was blunt. Undoubtedly, there was penetration on the complainant"

25. We agree with analysis by the learned Judge. The medical evidence adduced by Dr. Noorein on his behalf and that of his colleagues are proof that PW1 had been defiled. The learned trial Magistrate (L.N. Juma) on his part found that the evidence of PW1 and corroborated by that of PW4 the doctor that she was defiled was not shaken by the Appellant, even after cross-examination. As a second appellate Court, we should give deference to the findings of fact of the two Courts below. We find no basis to differ with the finding that the Appellant had defiled the PW1 and that he did so after kidnapping her and using threats to instill fear in her.

26. On the issue of identification, the learned Judge found that the Appellant was well known to PW1 by virtue of being her madrassa teacher. He considered PW1's evidence that he kidnapped her in broad daylight, used threats that he would curse her to become mad if she resisted or disclosed what transpired. He then considered the Appellant's alibi defence and concluded that the same did not dislodge the prosecution evidence. On our part, we have considered the analysis by the learned Judge. We have noted that the Appellant's alibi defence did not exonerate him as it covered the daytime, yet the offence was committed overnight. We find that the learned Judge carefully analyzed and evaluated the evidence and came to the right conclusion.

27. Having considered this appeal, we are satisfied that the two Courts below gave due consideration to the entire case, and duly applied the law. The learned Judge of the High Court cannot be faulted.

28. In the result, we find no reason to interfere with either the conviction or the sentence. The Appellant's appeal lacks in merit and is accordingly dismissed.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF FEBRUARY, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR