Epungure v Republic (Criminal Appeal 015 of 2020)
[2024] KECA 261 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 261 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 015 OF 2020

F SICHALE, FA OCHIENG & WK KORIR, JJA

MARCH 8, 2024

BETWEEN

PETER EKAI EPUNGURE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Lodwar, (Wakiaga J), dated and delivered on 3rd October2019 in HC. CRA NO. 4 OF 2019)

JUDGMENT

1. Peter Ekai Epungure (the appellant herein), has preferred this second appeal challenging the partial dismissal of his first appeal by the High Court which he had lodged against his conviction and sentence that had been imposed by the Senior Principal Magistrate's Court at Lodwar (Hon MK. Muchiri RM), for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on 20th September 2017, at around 7PM at (particulars withheld) he intentionally caused his penis to penetrate the vagina of F.L a child aged 15 years.

3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to Section 11 (1) of the same Act. The particulars of the offence were that at the same time and place, he intentionally touched the vagina of F.L, a child aged 15 years.

4. The appellant denied the charges after which a full trial ensued with the State calling a total of 5 prosecution witnesses while the appellant elected to give a sworn statement and called no witness.

5. In a judgment delivered on 8th February 2019, (Hon. MK Muchiri RM), found him the guilty of the main charge and convicted him of the same and sentenced him to serve 20 years' imprisonment.

6. Being aggrieved with the aforesaid conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on 3rd October 2019 Wakiaga J, dismissed the appellant's appeal on conviction but partially allowed the appeal on sentencing by reducing the same to 15 years' imprisonment from the date of conviction.

7. Unrelenting, the appellant has now filed this appeal vide an undated Notice of Appeal and written submissions dated 10th August 2023, raising two grounds of appeal as follows;

> "a. Whether High Court erred in law in failing to take consideration of the appellant's alibi defence?
>
> b. Whether the High Court erred in law for not ordering DNA test to be conducted to confirm that the appellant was the father of the child born by PW1, a breach of Section 36 of the *Sexual Offences Act*?"

8. The relevant facts in this appeal as narrated by the testimony of the prosecution witnesses are as follows; F.L was PW1 and the complainant in this case. It was her evidence that on 20th September 2017, at around 7PM she was at the appellant's house who had taken her there with his bodaboda as she was his girlfriend and that they had sexual intercourse until midnight. It was her evidence that she was in a relationship with the appellant and that they used to have sex until 28th October 2017, when she missed her periods and informed him that she was pregnant.

9. The appellant subsequently asked her to abort but she declined and he started threatening her that he would kill her. She later informed her mother (PW2), who reported the matter to the police on 24th January 2018 and she was later referred to Lodwar referral hospital where it was confirmed that she was expectant.

10. S E was PW2. It was her evidence that PW1 was her daughter and that she knew the appellant in 2018. That, on 24th January 2018, PW1 informed her that she was pregnant and that it was the appellant who had impregnated her. That, subsequently thereafter, the appellant came with his parents to negotiate on how he would take care of the unborn baby but the appellant reneged on the deal and she later reported the matter to the police. She later took PW1 to the hospital and it was confirmed that she was indeed pregnant.

11. SA testified as PW3. It was her evidence that she knew both PW1 and the appellant as neighbours. She further testified that on 8th August 2017 at around 10PM, she was in her house when she heard somebody calling PW1 and upon checking, she saw it was E who was calling PW1 and she saw E and the appellant outside the house.

12. That, immediately thereafter, E and the appellant started walking away whereupon she called PW1's father and asked him whether PW1 was home and she subsequently informed PW1's elder sister of what had transpired and requested her to investigate further.

13. That she later asked PW1 why she was not going to school and decided to buy a pregnancy kit to check if PW1 was pregnant and the test was positive. PW1 then subsequently told her that she had been impregnated by the appellant and they reported the matter to the police.

14. PW4 was Abirahaman Musa a clinical officer at Lodwar County Referral Hospital. He produced a P3 Form in respect of PW1 who had been treated at the facility. Upon examination, she was of fair general condition and a pregnancy test confirmed that she was indeed pregnant. On vaginal examination, no bruises were noted and there was no discharge.

15. PW5 was Martha Akal an Administration Police Officer attached to Lodwar Police Station and the investigations officer in this case. She testified that on 13th February 2018, at around 8am she was in the office when the complainant came and informed her of a case concerning defilement. She recorded her statement and established that on 20th September 2017, the appellant had a relationship with the complainant for over 2 months and that the complainant was a girlfriend to the appellant.

16. She later referred the complainant to Lodwar County Referral Hospital where she was confirmed to be pregnant. She later charged the appellant with the offence of defilement.

17. The appellant in his defence gave a sworn statement and called no witnesses and denied having committed the offence. He testified that there was no evidence to show that he had impregnated PW1 and at one time he was in Naivasha when his friend came and told him that there was a girl saying he was her husband. He never took the allegation seriously. He was arrested at Kanamkemer without knowing the offence he had committed and that he was "fined" by PW1's parents but he didn't pay the "fine" as it was too high. He concluded by saying that he only admitted that the unborn baby was his due to the respect he had for his parents.

18. When the matter came up for plenary hearing on 7th November 2023, Mr. Mukuna learned counsel appeared for the appellant whereas Mr. Okeka holding brief for Mr. Kakoi appeared for the respondent. Mr. Mukuna relied on his written submissions dated 10th August 2023 which he briefly orally highlighted in court whereas Mr. Okeka relied on his written submissions dated 3rd November 2023.

19. It was submitted for the appellant that the High Court erred in failing to consider the appellant's alibi defence as it was the appellant's testimony that he was not present at the time that the respondent claims the offence was committed and that the respondent failed to prove otherwise, predicated on the fact that the burden of proof does not shift to the accused person at any given time. For this proposition, reliance was placed on the case of *Kimotho Kiarie v Republic* [1984] KLR.

20. Consequently, we were urged to consider the appellant's uncontroverted testimony which clearly stated that at the time of the alleged commission of the offence, he was in Lodwar and the prosecution failed to disprove the same.

21. Turning to the second ground of appeal, the learned judge was faulted for not ordering a DNA test to be conducted to confirm that the appellant was the father of the unborn child which was in breach of Section 36 of the *Sexual Offences Act* and that this casts doubt on the prosecution case linking the appellant to the defilement.

22. It was further submitted that the appellant in his testimony had stated that he did not know the complainant and denied paternity of the minor and that as such, it was incumbent on the trial court to settle the same by ordering for a DNA test to be conducted and that failure to do so rendered a gross miscarriage of justice against the appellant.

23. On the other hand, it was submitted for the respondent that the High Court did not err in failing to take into consideration the appellant's alibi as there was no alibi defence as the appellant did not give an explanation where he was on 20th September 2017; that he confirmed he knew the complainant; that he admitted the child was his and he went into negotiations with the family of the complainant to enter settlement.

24. Regarding the issue of DNA, it was submitted that all the ingredients for the offence of defilement namely; age of minority, penetration and identity of the perpetrator were proved to the required standard and that going for a DNA test would have been a superfluous exercise. Further, that the issue

of the DNA testing could not have been made by the High Court as it was not before the trial court. Consequently, we were urged to dismiss the appellant's appeal.

25. We have carefully considered the record, the rival written submissions by the parties, the authorities cited and the law. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the Criminal Procedure Code, we are mandated to consider only matters of law. In Kados v Republic Nyeri Cr. Appeal No. 149 of 2006 (UR) this Court rendered itself thus on this issue:

> " ...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

26. In *David Njoroge Macharia v Republic* [2011] eKLR it was stated that under Section 361 of the Criminal Procedure Code:

> "Only matters of law fall for consideration and the court 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 also *Chemagong v Republic* [1984] KLR 213)."

27. Having carefully gone through the record, it is evident that the facts in this appeal are rather straightforward. Consequently, we have framed the following two main issues for our determination;

    a. Whether the learned judge erred in failing to consider the appellant's alibi defence?

    b. Whether the learned judge erred in failing to order a DNA test pursuant to the provisions of Section 36 of the *Sexual Offences Act* No.3 of 2006?

28. PW1 who was the complainant in this case testified that the appellant had taken her to his house on 20th September 2017 as she was the appellant's girlfriend where they had sexual intercourse on that day. It was her further evidence that they were in a relationship and they used to have sex until 28th October 2017 when she missed her periods and informed the appellant that she was pregnant and the appellant asked her to abort but she refused. She was subsequently taken to Lodwar Referral Hospital where it was confirmed that she was indeed pregnant.

29. It was her further evidence that she was 15 years old having been born on 29th September 2003 and that she was well known to the appellant having known him since August 2017.

30. PW1's evidence remained largely firm, consistent and unshaken even under cross examination. Additionally, the P3 Form dated 12th February 2018, that was produced by PW4 confirmed that indeed she was pregnant at the time of examination. Again, the evidence of this particular witness remained largely unchallenged even under cross examination.

31. PW2 who was PW1's mother corroborated PW1's evidence that she was 15 years old having been born in the year 2003, a fact that was corroborated by the birth certificate that was produced by PW5 which showed that she was 15 years old having been born on 29th September 2003.

32. From the circumstances of this case and having revaluated the entire evidence on record we are satisfied beyond any reasonable doubt that there was overwhelming evidence sufficient to find a conviction for the offence of defilement and as was rightly contended by the respondent, all the ingredients for the offence of defilement namely; age of the victim, penetration and identify of the perpetrator were all proved to the required standard of beyond any reasonable doubt for the following reasons;

33. Firstly, both PW1 and PW2 confirmed that PW1 was 15 years old a fact that was confirmed by the birth certificate that was produced by PW5.

34. Turning to penetration, PW1's evidence that she had sexual intercourse with the appellant on 20th September 2017 and that they were in a relationship and they used to have sex until 28th October 2017 when she missed her periods was never challenged by the appellant and the P3 Form that was produced by PW4 confirmed that indeed she was pregnant.

35. As a matter of fact, it is evident that were it not for the fact that PW1 discovered that she had conceived, the evidence on record suggests that the relationship between PW1 and the appellant would have continued as was rightly put by the learned judge thus; "They did not see anything wrong and they engaged in unprotected unlawful sexual act. The complainant did not see anything wrong with their action until she missed her period and the appellant provided the only remedy he knew best-to procure an abortion which she did not buy. This is what led to the complaint being lodged at the police station."

36. Regarding the identity of the appellant as the perpetrator of this offence, PW1's unchallenged evidence was that she was the appellant's girlfriend and they had sex on several occasions. Whereas the appellant in his defence stated that he did not know the complainant personally but he used to see her, he appeared to contradict himself when he stated in mitigation that that PW1 lives with him and that she was dependant on him. It is therefore evident that the identity of the appellant was not in question and he did not even raise this issue to PW1. Consequently, we are satisfied beyond any reasonable doubt that all the ingredients of the offence of defilement were proved to the required standard.

37. The learned judge was faulted for failing to consider the appellant's alibi defence. We have carefully gone through the judgment of the High Court and indeed note that the learned judge did not consider the appellant's alibi defence despite having raised the same in his Amended Petition of Appeal filed in court on 20th June 2019, in which he faulted the trial magistrate for failing to consider the same.

38. We have gone through the judgment of the learned trial magistrate and contrary to the appellant's assertion in the High Court that his alibi defence was not considered, the learned trial magistrate did actually consider the appellant's alibi defence in his judgment when he stated as follows;

> " In Kenya this position was judicially pronounced in Karanja v Republic (1983) KLR 501 where the Court of Appeal held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.
>
> Having noted hereinabove, the juncture at which the accused introduced his defence of alibi and taking into consideration the entire evidence adduced in this case I am in no doubt that the accused person's defence is a mere afterthought, a total sham and fanciful." (Emphasis Ours).

39. Be that as it may, we have gone through the appellant's alleged alibi defence and note that this issue was never raised to PW1 or any of the prosecution witnesses for that matter. Additionally, save for the appellant testifying thus in his evidence in chief; "At one time I was in school, Naivasha when my friend called me telling me that there is a girl saying I am his husband...." He did not state where he was on 20th September 2017, when the defilement was said to have taken place. Again, in cross examination he stated that in August he was in Lodwar yet the offence took place on 20th September 2017.

40. In view of the above, we have no doubts in our minds that the appellant's defence of alibi was clearly misplaced and without any basis and more so having been introduced at the tail end of the proceedings. He never stated where he was on 20th September 2017.

41. In the case of *Victor Mwendwa Mulinge v R* [2014] eKLR this Court while considering alibi defence stated;

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja v R [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought." (Emphasis added).

42. PW1's evidence that she was with the appellant at his house on 20th September 2017, when the offence took place remained firm and consistent throughout the trial and the totality of all the evidence on record was not dislodged by the defence given by the appellant and consequently we are in agreement with the finding by the trial court that the appellant's alibi defence was mere afterthought, a total sham and fanciful.

43. Consequently, we find no merit in this ground of appeal and we accordingly dismiss the same in its entirety and reject the contention by the appellant that the burden of proof was shifted upon him.

44. Lastly the High Court was faulted for failing to order a DNA test pursuant to the provisions of Section 36 of the *Sexual Offences Act* No. 3 of 2006. We have carefully gone through the record and note that this issue was not raised before the trial court. Whereas it might have been ideal to conduct a DNA test in light of the pregnancy that ensued, the provisions of Section 36 of the *Sexual Offences Act* are not couched in mandatory terms.

45. See the case of *Robert Mutungi Muumbi v Republic* [2015] eKLR, where this Court stated thus regarding the provisions of Section 36 of the *Sexual Offences Act*:

> " Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical evidence on DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

46. Again, in the case of *A M L v Republic* (2012) eKLR where this Court stated:

> "The fact of rape or defilement is not proved by D.N.A test but by way of evidence."

47. In light of the overwhelming evidence by the prosecution pointing towards the appellant as the perpetrator of this offence, we are of the considered opinion that a DNA test was not necessary in the circumstances. Consequently, nothing turns on this point.

48. Accordingly, we are in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of defilement against the appellant beyond any reasonable doubt and that there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement and that it was the appellant who defiled PW1 and no one else.

49. We therefore find and hold that the appellant's conviction for the offence of defilement was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant's appeal on conviction.

50. Turning to sentence, the appellant was initially sentenced to serve 20 years' imprisonment which sentence was subsequently reduced to 15 years' imprisonment by the High Court. We have considered the circumstances under which the offence was committed. Additionally, we are alive to the jurisprudence that has been emanating from this Court regarding the nature of minimum sentences as provided for in the *Sexual Offences Act* where the Court has been frowning on the nature of such sentences as they fetter the discretion of a court to impose an alternative sentence in an appropriate case.

51. Taking into account the appellant's young age at the time of the commission and the mitigation he tendered before the trial court, we are inclined to exercise our discretion in his favour to reduce the sentence.

52. Accordingly, we set aside the sentence of 15 years' imprisonment imposed by the High Court and substitute the same with a sentence of 10 years' imprisonment to run from the date of conviction in the trial court on 8th February 2019.

53. The appellant's appeal only succeeds to that extent.

DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF MARCH, 2024.

F. SICHALE

.....

JUDGE OF APPEAL

F.A OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR