Leparu v Republic (Criminal Appeal 22 of 2019)
[2024] KECA 251 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 251 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 22 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

MARCH 8, 2024

BETWEEN

PAUL NTIMAMA LEPARU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Nanyuki (M. Kasango, J.) dated 18th April 2018 in HCCRA No. 116 of 2017)

JUDGMENT

1. This is a second appeal. Our mandate is limited to points of law only as mandated by section 361 of the *Criminal Procedure Code*. In David Njoroge Macharia -vs- R. [2011] eKLR, this Court, in reiterating this mandate, stated as follows:-

> " Only matters of law fall for consideration and the Court will not normally interfere with concurrent findings of fact by the two lower courts 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 –vs- Republic [1984]KLR 213)."

2. The appeal relates to Paul Ntimama Leparu, the appellant, who on 3rd July 2017 was convicted of defilement under sections 8(1) and 8(3) of the *Sexual Offences Act* (No. 3 of 2006), and sentenced to serve 20 years in jail. The particulars of the offence were that on diverse dates between December 2015 and 1st March 2016 in Laikipia in the Republic of Kenya he intentionally and unlawfully caused his penis to penetrate the vagina of JK (PW 1) a girl aged 13 years old.

3. PW 1 was the only witness to the incident. Following voire dire examination, she gave sworn testimony to state that she was 13 years old and in Class 5 at [Particulars Withheld] Primary School. She produced

her birth certificate showing that she was born on 15th August 2002. She told the court that the appellant was her neighbor and her boyfriend. Before this, she had had another boyfriend known as Johana between 2014 and 2015. The relationship had ended. When she became the appellant's girlfriend, he would visit her at night in her home. She was sharing a bed with her two siblings, but the appellant would come when they were asleep and they "make love". She would remove her underwear, he touches her breasts and he penetrates her vagina using his penis. The relationship was her secret. She later learnt that the appellant was married.

4. On 5th May 2016 in school, a pregnancy test was done on all female students. It was found that she was pregnant. Her parents were informed and a report made to Nanyuki Police Station where Corporal Emily Ogalla (PW 4) took up the investigations, and got her to be examined at Nanyuki Teaching and Referral Hospital by Dr. Tulit Malimo (PW 2). The doctor found that her genitalia was normal. She had no tears or lacerations or blood on her genitalia. Her hymen was not intact.

5. This led to the arrest and charge of the appellant. He gave a sworn defence to state that he was seventeen years old and had been a form three student at [Particulars withheld] Secondary School. He told the Court that PW 1 was her neighbor since childhood, but denied that they had a relationship, or that he had defiled her. He stated that he had not expressed any interest in her, and that the case had been made up. He denied that he had a wife or child. He called his father Tarita Rartalpo (DW 2) who testified that the appellant had a wife and child. DW 2 stated that at the time of the alleged incident the appellant was in Form 1. PW 1's father is the one who complained to DW 2 regarding the incident, and suggested that he was willing to marry off PW 1 to the appellant. When the appellant was asked about the incident he denied the allegation that he had defiled PW 1, DW 2 testified.

6. This is the evidence that the trial court considered and came to the conclusion that the prosecution had proved the charge against the appellant beyond all reasonable doubt. The court found that PW 1 –

> " was sexually penetrated between December 2015 and May 2016. At the material time and looking at the birth certificate the complainant must have been a person aged between 13 years and 15 years. She was therefore a child as defined under the *Children Act*."

7. The appellant appealed to the High Court. The grounds of appeal were that the trial court had erred in law and fact by convicting him on inconsistent and insufficient evidence; convicting him against the weight of evidence; relying on an age assessment even when PW 1 had produced her birth certificate; failing to consider that he was a minor; failing to consider that the pregnancy was nonexistent; by passing a sentence that was too harsh; and by failing to consider his written submissions. The High Court found that the appellant had been convicted on overwhelming evidence, and that his defence had been correctly rejected.

8. During the hearing of the appeal before this Court, the appellant was not represented but had filed written submissions on which he elected to rely on. Learned counsel Mr. Naulikha represented the State. He relied on his written submissions. The appellant submitted that the prosecution had failed to conclusively prove the charge against him; that the trial court ought to have ordered for DNA testing to prove that he was responsible for the pregnancy, now that PW 1 had testified that he had him and Johana as her boyfriends; and that PW 1 was not a credible witness, and her evidence required medical corroboration. According to the State, the learned Judge had properly evaluated the evidence to be able to come to the conclusion that the conviction was based on direct, reliable, overwhelming, cogent and consistent evidence; that the medical evidence had conclusively corroborated PW1's evidence; and that the appellant's defence had been considered and properly rejected as not being true.

9. We have anxiously considered the evidence as recorded, the impugned judgment and the rival submissions. We are alive to the fact that PW 1 was the only witness to the incident. She was quiet about the incident until the school discovered that she was pregnant. When asked she stated that it was the appellant who had been defiling her for a considerable period of time. She had had another boyfriend, but said that the relationship had ended by the time the appellant came on board, as it were, and made her pregnant. She subsequently lost the pregnancy. The appellant denied to have slept with her. The medical evidence indicated that she had lost her hymen, but there was no evidence of recent sexual interaction observed on her genitalia. To our mind, the loss of her hymen could be attributed to the appellant. But, it could also be attributed to Johana. Now that she was expectant, and the appellant denied to have had sexual intercourse with her, the most conclusive way to prove that the appellant had sexual intercourse with her and made her pregnant was to have DNA testing to establish that he was the father to the child, and therefore had indeed been having sexual intercourse with her. In this case, evidence was adduced to the effect that PW 1 lost the pregnancy. There is no child that would have enabled DNA to be done to establish the paternity of the child. We make this observation while cognizant of the submissions made on behalf of the appellant during the first appeal where his counsel stated as follows:-

> "The hymen was missing. But she stated she had a boyfriend with whom she had sexual relation. The trial court should have considered the missing hymen was due to that previous relationship. So, it cannot be said the hymen was broken by the appellant since she confirmed she engaged in sexual intercourse."

10. If the broken hymen was the medical evidence that was called to corroborate PW 1's evidence that the appellant had been having sexual intercourse with her, it is clear that her genitalia did not reveal any recent sexual interaction and it was therefore possible that the hymen had been broken by Johana.

11. It should be recalled that PW 1 told the trial court that she was seven months pregnant when the school discovered on 5th May 2016. If her relationship with the appellant had begun in December 2015, had it been on for seven months? We ask this question because the appellant stated in defence that he was arrested alongside Johana. Indeed, John Njue Kibiru (PW 5), a teacher at PW 1's primary school, testified that when the pregnancy was discovered and a report made to police:

> " Some boys responsible for the pregnancy were brought to the school by the complainant's father. One is the accused in the dock... "

Who were the other boys? How many were they? Wasn't the appellant therefore believable when he testified that he was arrested alongside Johana? Were the boys not being arrested on information from PW 1? If she gave names of boys, including the appellant and Johana, was she certain about who had made her pregnant? We raise all these issues to show that the first appellate court did not carefully reconsider and reevaluate the evidence that had been tendered before the trial court before it reached the conclusion that the appellant had been convicted on overwhelming evidence. PW 1 was not as reliable a witness as the two lower courts were made to believe.

12. In conclusion, therefore, we find that the appellant was not convicted on cogent and conclusive evidence. The appeal is allowed. The conviction was therefore not safe, and we quash it. The custodial sentence is consequently set aside, and the appellant shall henceforth be set at liberty unless he is otherwise being lawfully held.

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

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR