Wamalwa v Republic (Criminal Appeal 224 of 2020)
[2024] KECA 742 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 742 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 224 OF 2020

F SICHALE, FA OCHIENG & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

JOSEPH WAMALWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Lodwar (Wakiaga, J.) delivered and dated 12th May 2020 in HCCRA No. 23 of 2019)

JUDGMENT

1. This is the second appeal of Joseph Wamalwa, hereinafter referred to as the appellant. He was at the trial charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars were that on 24th April 2018 at about 8.00 am at Turkana Central Sub-County in Turkana County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of P.A., a girl aged 14 years. The appellant faced an alternative charge of indecent act with a minor contrary to section to section 11(1) of the *Sexual Offences Act*, the particulars being that on the date and at the place mentioned in the main charge he intentionally touched the vagina of P.A. The appellant denied the charges and upon conclusion of the trial, he was convicted on the main charge and sentenced to serve 15 years imprisonment. Dissatisfied with the decision of the trial Court, the appellant preferred an appeal to the High Court which was subsequently dismissed, hence his present appeal.

2. In this appeal, the appellant raises the following grounds of appeal: that the trial Court erred in finding that he committed the offence yet the complainant had had previous sexual encounters; that the trial Court erred by not taking cognizance of the fact that the complainant testified unwillingly; that the evidence of PW2 contradicted the findings in the P3 form, hence the case was not proved; and that his rights to a fair trial under Article 50(2)(g) and (h) of *the Constitution* were contravened.

3. PW1 was P.A. who testified that on 24th April 2018 at about 8.00 am, she was sent by her mother to go and collect payment for vegetables from the appellant. On reaching the appellant's house, he welcomed her and she took her place on one of the seats. Shortly thereafter, the appellant turned on her, gagged her mouth and defiled her. As the complainant was leaving, the appellant threatened to kill her if she disclosed the incident. She went back home and when her mother came back at 6.00 pm, she reported the ordeal to her. The matter was subsequently reported at Lodwar Police Station and the complainant taken to Lodwar County and Referral Hospital where she was treated and a P3 form filled for her.

4. Andrew Emuria testified as PW2 stating that he worked at Lodwar County & Referral Hospital where he attended to the complainant on 24th April 2018 and filled for her a P3 form on 25th April 2018. He stated that upon examining the complainant, he noticed that she had tenderness on her abdomen caused by a blunt object. She also had a perforated hymen with no discharge while her urine contained proteins. He concluded that there was penetration.

5. PW3 PC Felix Oreng was the investigating officer in the matter having taken over from the previous investigating officer.

6. When the appellant was placed on his defence he testified as DW1 and stated that he went to Eldoret for evangelical duties on 17th April 2018 and came back to Lodwar on 23rd April 2018 at about 9.30 pm. During his absence, his colleague pastor was looking after his house. On 24th April 2018, at about 7.30 am, a certain lady went and wished him well for having travelled safely. He then left for another meeting at about 8.00 am and returned home in the evening. Later that night, he was arrested and taken to Lodwar Police Station. He further testified that before the incident, the complainant's mother had told him that his church belonged to devil worshipers.

7. DW2 was Joseph Emekwi who testified that the appellant had left him to look after his house. He stated that when the appellant returned on 23rd April 2018, they spent the night at the appellant's house and on 24th April 2018 in the morning, a certain lady went and greeted them then left for town. They then proceeded to preach in town on that day before they parted ways in the evening.

8. DW3 was Josephat Erenga Ekiru who testified that on 24th April 2018, DW1 and DW2 went to his house at about 8.00 am after which they all proceeded to town where they preached until 2.00 pm when they parted ways.

9. Alice Ejiran testified as DW4 stating that on the material day, she passed by the appellant's house where she was given some onions. She found the appellant in the company of DW2. The appellant and DW2 later left for the town to preach.

10. When this appeal came up for hearing via the Court's virtual platform on 4th December 2023, learned counsel Mr. Kipkurui appeared for the appellant while learned counsel Mr. Kakoi was present for the respondent. Counsel for the parties had filed written submissions which they opted to rely on accompanied by brief oral highlights.

11. Learned counsel Mr. Kipkurui relied on the submissions dated 30th April 2021 and asserted that the element of penetration was not proved. According to counsel, the evidence of PW2 was inconclusive as to whether penetration had occurred. Counsel pointed out that PW2 also testified that the complainant was not a virgin at the time of the alleged offence. It was his submission that the previous frequent sexual encounters are what caused the perforation of the hymen hence the appellant could not be linked to the offence. Still contending that the case against the appellant was not proved, counsel submitted that the trial Court and the first appellate Court erred in failing to take cognizance of the complainant's reluctance to testify. According to counsel, had the two courts considered this fact, they

would have found that the complainant was not a credible witness hence raising doubt as to the veracity of her evidence. Counsel stated that the demeanor of the complainant showed that the alleged offence had not taken place.

12. It was also the counsel's submission that the appellant was not accorded his right to a fair hearing as protected by Article 50(2)(g) and (h) of *the Constitution* and section 43 of the *Legal Aid Act*. In counsel's opinion, the silence of the record on whether the learned magistrate informed the appellant of his right to legal representation means that the appellant was never informed of his right to counsel of his choice. Counsel also stated that the appellant was only issued with witness statements and not the P3 form that the prosecution sought to rely on. Counsel relied on the cases of Republic v. Karisa Chengo & 2 others [2017] eKLR and Thomas Alugha Ndegwa v. Republic [2016] eKLR to urge that where substantial injustice occurs in a trial, as had happened in the appellant's case, the conviction ought to be quashed. Counsel therefore urged us to allow the appeal in its entirety.

13. For the respondent, learned counsel Mr. Kakoi relied on the submissions dated 6th November 2023. Counsel referred to case of Karineo v. Republic [1982] KLR 213 and urged us not to exceed our jurisdiction by interfering with the concurrent findings of fact by the two courts below. Counsel submitted that the evidence on record established all the elements of the offence to the required standards. On the claim that the complainant's evidence was discredited by the fact that she was compelled to testify, counsel asserted that the issuance of a warrant of arrest by the trial Court was discretionary and such power was bestowed upon the trial Court by sections 145 to 147 of the Criminal Procedure Code. Counsel also contended that the appellant did not challenge the exercise of discretion in the first appeal. Counsel submitted that this ground of appeal should be dismissed as the trial Court gave reasons for the exercise of that power.

14. Regarding the contention that the appellant's right to a fair trial was violated, counsel pointed out that the issue was not raised before the first appellate Court and should not be considered by this Court. Counsel submitted that the appellant having been a pastor cannot be said to have been unaware of these rights and that no substantial injustice was therefore occasioned to him. In the end, counsel urged us to dismiss the appeal in its entirety.

15. This being a second appeal, we are obliged, by dint of section 361(1)(a) of the Criminal Procedure Code to consider only issues of law. The general rule is that the findings of fact by the trial Court and the first appellate Court are to be respected save where such conclusions are not supported by the evidence or are based on a perversion of the evidence. These well-established principles have been articulated by this Court in numerous decisions, including Adan Muraguri Mungara v. Republic [2010] eKLR, where the Court was empathic that:

> " Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 Criminal Procedure Code). As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

16. We have given due consideration to the record of appeal and the submissions and the authorities relied upon by counsel for the parties. We will address all the grounds of appeal in the determination of this appeal.

17. The first issue we address is whether the element of penetration was proved. On this issue, the appellant's counsel states that the evidence on record points to the fact that the complainant had sexual encounters before the incident and that explains the perforation of the hymen. According to counsel, this fact of previous sexual engagement renders the evidence inconclusive as to whether the complainant was penetrated by the appellant. While we agree that the fact of old tears in the hymen could be indicative of previous sexual activity, we are in concurrence with the first appellate Judge that the issue before the trial Court was not whether the complainant had previously had sex. The issue was whether she had been defiled by the Appellant on the 24th April 2018. In our view, the existence of perforation or old tears on a complainant's vagina does not exonerate the appellant. Whether the complainant was defiled by the appellant is a matter to be determined by the evidence adduced at the trial.

18. We have reviewed the evidence of PW1 and we note that she was clear as to what transpired on the morning of 24th April 2018 in the appellant's house. On cross-examination, the complainant denied the suggestion that it was her mother who had gone to the appellant's house. She emphasized that she was the one who went to the appellant's house to collect the money. During the defence case, the appellant and his witnesses gave evidence to the effect that it was DW4 who went to the appellant's house that morning not to fetch money but to offer pleasantries. None of the witnesses, however, testified that DW4 was the complainant's mother. We also note that the complainant's mother was to be a prosecution witness but could not be traced for bonding.

19. Still in pursuit of his appeal against conviction, the appellant questioned the evidential value of the P3 form that was produced by the prosecution at the trial. A perusal of the evidence of PW2 and the P3 form itself shows that PW2 arrived at the conclusion that the complainant was penetrated. Much as the witness conceded that he did not examine the complainant for spermatozoa and that the complainant had previous sexual encounters, this does not dilute PW2's finding that the complainant was penetrated. We also observe that prove of defilement is not solely dependent upon medical evidence. Whether or not a sexual offence was committed is essentially proved by the evidence of the victim who is the one who has experienced the sexual violation and narrates the ordeal at the trial. That is the essence of the proviso to section 124 of the *Evidence Act*, which allows the court in a criminal case involving a sexual offence where the only evidence is that of the alleged victim of the offence to 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. In this matter we find no reason to depart from the unanimous conclusion of the trial Court and the first appellate Court as to the truthfulness of the complainant. The appellant having not raised any issue about the age of the complainant and that the complainant knew him, we reach the conclusion that all the ingredients of the offence of defilement were proved.

20. The resolution of the foregoing issue leads to the dismissal of the appellant's claim that the required standard of proof was not attained by the evidence on record. In our view, proof beyond reasonable doubt does not amount to absolute certainty but a high degree of probability. That standard was attained by the evidence on record. In the circumstances, we do not find any error on the part of the trial Court and the first appellate Court in the manner in which they appreciated the evidence on record in light of the applicable legal principles and rules of evidence.

21. The next issue is the appellant's contention that the complainant was forced to testify, hence her evidence was not credible. As submitted by counsel for the respondent, this issue was never raised before the first appellate Court. Ordinarily, this Court can only consider issues addressed by the first appellate Court since venturing into issues which that Court was not called upon to determine would lead to an improper interference with its decisions when in fact it did not have a chance to render itself

on such issues. We will therefore decline the appellant's invitation to tackle an issue that did not benefit from the insights of the two courts below. Our position aligns with the holding in AT v. Republic [2023] KECA 1393 (KLR) that:

> "The reason why this Court shies away from interfering with decisions of the trial court or the first appellate court on matters not raised before the said courts is that this Court deals with the appellant's grievances based on allegations of errors of omission or commission committed by the said courts. Where the issues being raised are not matters which were placed before the lower courts and therefore the said courts did not address their minds to them, it would be improper to interfere with their decisions when they had no chance of dealing with the same and no finding was made in respect thereof."

22. The same fate would befall the issue of alleged infringement of the right to legal representation as this issue is also being raised for the first time before us.

23. Lastly, we are aware that the issue of sentence is not within our purview unless the sentence meted upon the appellant violates the law. Upon reviewing the sentencing proceedings, we are satisfied that the trial Court properly exercised its discretion in imposing upon the appellant a sentence of 15 years in prison. We therefore do not find any reason to enter that arena.

24. In the upshot, we find that this appeal lacks merit and we dismiss it in its entirety.

25. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024

F. SICHALE

..... JUDGE OF APPEAL

F. OCHIENG

..... JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR