Cheruiyot v Republic (Criminal Appeal 118 of 2017)
[2024] KECA 1083 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KECA 1083 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 118 OF 2017

FA OCHIENG, F SICHALE & WK KORIR, JJA

AUGUST 21, 2024

BETWEEN

BERNARD KIPKORIR CHERUIYOT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kericho (M. Muya, J.) dated 21st November, 2017 in HCCR No.19 of 2016)

JUDGMENT

1. The appellant, Bernard Kipkorir Cheruiyot was charged with the offence of defilement contrary to section 8 (1) (2) as read with section 8 (2) of the *Sexual Offences Act* No.3 of 2006. The particulars were that on 29th September, 2012 at around 5. 00p.m at Rift Valley Province, intentionally caused his penis to penetrate the vagina of S.C, a child aged 4 years.

2. The appellant denied the offence and a trial ensued where the prosecution called 8 witnesses. On his part, the appellant gave an unsworn statement of defence and he had no witness to call.

3. On 5th May, 2024 the trial court found the appellant guilty of the offence of defilement and sentenced him to life imprisonment.

4. Dissatisfied, the appellant now filed his first appeal. On 21st November, 2017, Muya, J. dismissed the appellant's appeal both on conviction and sentence.

5. Undeterred, the appellant has now filed this appeal. In his undated supplementary grounds of appeal, the appellant raised 3 grounds of appeal. These can be summarized as follows: -

i. The two lower courts erred in relying on the evidence of PW2 and PW4, both minors who were not examined on the importance of speaking the truth and that the appellant was prejudiced as he did not cross-examine the two witnesses.

ii. The sentence of life imprisonment was mandatory in nature and the court did not exercise its discretion in imposing the said sentence.

iii. The elements of defilement were not proved to the required standard.

6. On 31st October, 2023, the appeal came up before us for plenary hearing. The appellant who appeared in person relied on his written submissions. In a brief highlight he urged us to find that his stay in prison had reformed him.

7. However, in his written submissions, he complained that his constitutional rights under Article 50 (2) (P) of the *Constitution* were infringed as both PW2 and PW4 were not subjected to voire dire examination as to whether they understood the importance of speaking the truth and neither was he given an opportunity to cross-examine them. Further, that PW2 was silent on the identity of the person who defiled her.

8. Secondly, he faulted the sentence of life imprisonment as the trial court was deprived of its discretion in sentencing him.

9. Thirdly, that the age of PW2 was not proved as although the charge sheet indicated that she was 4 years, the Clinical Officer (PW8) assessed her age to be 4 years and 9 months and her mother PW1, told the trial court that PW2 was 3 years.

10. On penetration, the appellant was of the view that the fact that PW2 and himself were both found to have syphilis, and PW2 being found to have bruises and a whitish discharge on her private parts, these did not go to prove penetration. According to him, syphilis is not only transmitted through sexual intercourse as children can be born with it.

11. In conceding the appeal, Miss Kisoo for the respondent relied on her written submissions dated 24th October, 2023. While highlighting the said submissions, she contended that although PW2 and PW4 were subjected to voire dire examination, the trial court failed to test their appreciation of speaking the truth and/or the nature and import of oath taking; that failure by the appellant to cross-examine PW2 and PW4 was an infringement of the appellant's right to a fair trial as enshrined in Article 50 (2) (K) of the *Constitution*. For this proposition, reference was placed on the decision of PW1 *Kinyanjui Kimeuku – vs – Republic* (2016) eKLR. In view of this irregularity, counsel was of the view that this was a proper case to order a retrial.

12. We have considered the record, the appellant's and the respondent's submissions, the authorities cited and the law. The appeal before us is a second appeal. The mandate of this court in a second appeal was restated in the case of *Stephen M'Irungi v.Republic* [1982-88]1KAR, 360 to be:

> " Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

13. On 21st June, 2013, PW1 (the mother of PW2) testified that her daughter at the time of her testimony was 5 years and 4 months old, having been born on 23rd December, 2007.

14. She produced the birth certificate. She testified that on 29th September, 2012 at about 5p.m, PW2's friend came and picked up PW2 so as to play together. After about an hour PW2 came back crying. She inquired and Karen told her that Bernard (the appellant) had given PW2 some roasted maize and she herself was given unroasted maize. Bernard chased Karen and took PW2 to his house and locked her inside his house.

    After some time PW2 came out while crying. PW1 checked her private parts and found some white stuff on her thighs. She took PW2 to Kericho District Hospital.

15. PW2 was subjected to voire dire examination by the trial Magistrate. The trial Magistrate concluded that although PW2 understood the importance of telling the truth, she was however too young to understand the meaning of an oath.

16. He therefore directed that PW2 was to make an unsworn testimony. PW2 testified that she knew Bernard the appellant. She testified that Bernard did something to her although she did not know what that was. All she knew was whatever Bernard did to her in his house caused her pain. She testified that it was Bernard who removed her pair of trousers and did whatever he did on his bed. She had never experienced such an ordeal before.

17. PW3 DC, PW2's grandmother examined PW2's private parts immediately after the ordeal. She found her private parts to be wet with yellowish and whitish substance. She accompanied PW1 together with PW2 to Kericho District Hospital. PW3 knew Bernard as a neighbor.

18. PW4 Karen Cheptoo, a minor was also subjected to voire dire examination. The trial Magistrate found that she was intelligent enough. However, he directed that she gives an unsworn statement as she was too young to understand the meaning of an oath.

19. PW4 testified that she was playing with PW2 when Bernard, the appellant gave her a piece of roasted maize. The appellant then locked PW2 in his house and when PW2 came out of this house, she was crying. PW2 told her that Bernard... "had slept on her."

20. PW5 RC is PW2's grandfather. He knew the appellant (Bernard) who is a son of their neighbour by the name Andrew. After the incident, she asked his wife to take PW2 to hospital. He questioned the appellant who sought for forgiveness claiming that he was misdirected by "satan and alcohol." He together with others escorted the appellant to Chepseon Police Station where he was received by PW6, PC Juma Chiguba.

21. Robert Kipyegon Langat (PW7) a Clinical Officer at Kericho District Hospital examined the appellant on 1st October, 2012. He found the appellant to be suffering from syphilis.

22. Isaac Misoi (PW8) another Clinical Officer from Kericho District Hospital examined PW2 and found that she had contracted syphilis. He produced the P3 dated 1st October, 2012.

23. In his unsworn statement of defence the appellant denied the offence. He testified that on the material day he was with a friend and this friend bought maize on the roadside. He left his friend in his house to go and borrow a hammer. Upon his return to his house, he found his friend had left. He maintained that it was possible that his friend had defiled PW2 but for him he was framed by PW1 who had earlier alleged that they had sired a child together.

24. In our view, the appellant was well known to PW1, PW2, PW3, PW4 and PW5 as they all lived in the same neighbourhood. PW2 and PW4 gave unsworn evidence as they were minors. Indeed, PW2 could not say what had happened to her. All she knew was that the appellant removed her pair of trousers, lay on her on a bed and she felt pain. As soon as she left Bernard's, house, PW4 saw her crying. PW1 and PW3 examined her and found that she had some discharge on her private parts.

25. There was also the evidence of PW6 and PW7 the Clinical Officers who examined the appellant and PW2. The appellant was found to have had syphilis and he infected PW2 with syphilis. In our view, the evidence of PW1, PW2, PW3 and PW5 as well as the medical evidence sufficiently established that the perpetrator of the heinous crime was the appellant. The Judge considered the totality of the evidence and stated: -

> " It is noted that the accused was not given the opportunity to cross-examine the complainant and Caren PW4. It was the right of the accused as enshrined in Article 50 of the *Constitution* to face his accuser. However, the court did not place much reliance on the evidence of the Complainant and that of Caren as they were minors but on the complainant's mother and that of the doctors.
>
> When the accused was examined he was found to be suffering from syphilis. When the complainant was examined she was found to be positive with syphilis.
>
> This could not be by sheer coincidence. There is overwhelming evidence against the accused. I am satisfied that the learned trial Magistrate did consider his defence before arriving at his decision."

26. The appellant's attempt to put blame on PW1 did not go far. He neither cross-examined PW1 on the allegation of being framed up. His defence was a sham.

27. We find that inspite of the State conceding the appeal, there was overwhelming evidence against the appellant. He was known by PW2 and her friend, PW4. He was also known by PW2's mother (PW1), grandmother (PW3) and grandfather (PW5). The incident happened during hours of daylight. As stated above, PW1 (the mother of PW2) and PW3 (the grandmother of PW2) checked on PW2's private parts immediately after the incident. They both noticed whitish stuff in her genitalia. The two, PW1 & PW3 as well as PW5 (PW2's grandfather) knew the appellant as a neighbor. PW5 told the trial court that the appellant sought forgiveness from him blaming 'Satan and alcohol' for his evil actions. Then there was the evidence of PW7 and PW8. PW7 found the appellant to have syphilis. PW8 found PW2 to have contracted syphilis. As pointed out by the Judge, this would not have been a mere coincidence. Even if the evidence of PW2 and PW4 is to be disregarded as these two witnesses were not questioned as to whether they understood the import of an oath, in our view the evidence as stated above is overwhelming. PW2 produced the birth certificate of her daughter. The appellant was known to PW1, PW3 and PW5. There was medical evidence that proved penetration. We find that there was overwhelming evidence to sustain the conviction even in the absence of the evidence of PW2 and PW4. It is in view of the above that we find that the appeal is unmerited.

28. Accordingly, we find no merit in the appellant's appeal against conviction. As for the sentence, the appellant was sentenced to serve life imprisonment. This was a lawful sentence.

29. Accordingly, the appellant's appeal is hereby dismissed.

It is so ordered.

DATED, SIGNED & DELIVERED AT NAKURU THIS 21ST DAY OF AUGUST, 2024.

F. SICHALE

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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