Lekisei v Republic (Criminal Appeal 14 of 2016)
[2024] KECA 1091 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KECA 1091 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 14 OF 2016

F SICHALE, FA OCHIENG & WK KORIR, JJA

AUGUST 21, 2024

BETWEEN

DAVID TUMANKA LEKISEI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Naivasha, (Meoli J), dated and delivered on 3rd June 2016) in HC. CRA No. 96 of 2015)

JUDGMENT

1. David Tumanka Lekisei (the appellant herein), has preferred this second appeal challenging the dismissal of his first appeal by the High Court which he had lodged against his conviction and sentence for the offence of defilement of a girl contrary to Section 8 (1) as read with Section (2) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the offence were that on the 26th day of November 2013, at around 5PM at (particulars withheld), he unlawfully and intentionally caused his penis to penetrate the vagina of MW, a girl aged 4 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 committed an indecent act to MW, a girl aged 4 years, by rubbing his male genital organ against the said MW's female organ.

4. The appellant denied the charges after which a full trial ensued with the State calling a total of 7 prosecution witnesses while the appellant elected to give an unsworn testimony and called no witness.

5. In a judgment delivered on 16th May 2014, (Hon. T.A Sitati, the then, Ag. Senior Resident Magistrate) found him guilty of the main charge and convicted him of the same and sentenced him to life 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 June 2016, Meoli J, dismissed the appeal in its entirety.

7. Unrelenting, the appellant has now filed this appeal vide a Notice of Appeal dated 14th June 2016 and an undated supplementary grounds of appeal raising 3 grounds of appeal as follows:

> " a. That the learned appellate judge of the high court erred in law by upholding the appellant's convicted (sic) and sentence of life imprisonment but failed to note that this sentence was not in line with the spirit of the current *Constitution* especially Articles 50 (2) (q) and Article 25 (c) and other law provisions which allows review of sentences.
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> b. That the learned appellate judge of the high court erred in law by upholding the appellant's conviction and sentence without considering that the elements of the offence of defilement were not proved to the required standard of the law.
>
> c. That the appellant's defence was not fully analysed against the whole prosecution case."

8. The relevant facts in this appeal as narrated by the testimony of the prosecution witnesses are as follows: SN testified as PW1 and was the complainant's mother. It was her evidence that on 26th November 2013 at around 5.00PM, she was attending prayers at Mama Jane's house (PW3), and after the prayers Mama Jane informed her that one Ndungu who was a neighbour had defiled her daughter. Mama Jane further told her that this information had been relayed to her by her daughter AW (PW4).

9. It was her further evidence that she headed to Ndungu's house wailing in the accompany of other women and when Ndungu saw them, he stormed out of his house wielding a panga and dared any of them to touch him. MW (PW2) then came out of the appellant's house crying. PW1 took her to Kojong'a clinic where she was examined.

10. MW testified as PW2 and was the complainant in this case. It was her evidence that she knew the appellant as the man who pushed her onto his bed, removed her inner wear before inserting his male "thing" in her private parts. She felt a lot of pain.

11. MSK (whose full name was withheld in order to protect her identify) testified as PW3. On 26th November 2013 at around 5PM, she was entertaining Christians who had come to her house for fellowship when her daughter (PW4) came and told her that their uncle, (the appellant herein) had taken MW (PW2) and removed her underpants and placed her on a bed.

12. PW3 alerted one of the ladies at the fellowship by the name Nyambura (PW5) to go and plead with the appellant to let go of MW (PW2) and when Nyambura returned, she looked alarmed. She told her that indeed, the appellant was having carnal knowledge of MW (PW2) but she was afraid of accosting him as he had a panga by the bedside. Subsequently, PW3 informed MW's mother (PW1) and together, they stormed the appellant's house. However, the appellant repulsed them with a panga. MW (PW2) was later taken to hospital.

13. AW testified as PW4 and was PW3's daughter. It was her evidence that she knew the appellant and that he was the one who lifted PW2, lay her on a bed, removed her inner clothes and did bad manners to her by inserting his male organ into her female genitalia. When she saw this, she went and informed her mother (PW3).

14. LNK testified as PW5. It was her evidence that on 26th November 2013, at 5PM, she was attending a fellowship at Mama Jane's place (PW3) when PW4 came and told Mama Jane that the appellant had taken MW to his bed and was doing bad things to her. PW3 requested her to go and verify.

15. PW5 obliged and when she went to the appellant's house, he found him lying on MW (PW2) having carnal knowledge with her and she saw a panga beside the appellant's bed. She then dashed out and went back to Jane's (PW3's) house where she informed the other women who were attending the prayers.

16. PW6 was Edwin Kiprotich a clinical officer attached to Narok district hospital. He produced a P3 Form in respect of PW2 who had been defiled on 26th November 2013. Upon examining her vagina, he noted a swollen vulva, a torn hymen and a laceration on an angle of 3.00 O'clock, measuring (0.5 x 0.5) centimetres. There was no discharge. However, there was evidence showing penile penetration.

17. PW7 was Corporal Darius Mwangi, an investigating officer in this case. He effected the arrest of the appellant on 27th November, 2013 from a private Clinic where the appellant had taken refuge from a crowd that was baying for his blood.

18. It was his further evidence that PW2 recognized the appellant as Baba Ndungu which was his nick name but his official name was David Tumanka.

19. The appellant in his defence gave a lengthy unsworn statement and denied committing the offence. He stated that on the material day, he was in his house when he heard screams outside his house where a large crowd had gathered. Outside his house he discovered that his sister in law (PW3), had made calls to neighbours to gather and this made him believe she had pre planned to frame him up. They claimed that he had defiled a 3- year-old girl.

20. In a nutshell, he claimed that the case was a frame-up by PW3 who wanted to use the mob to kill him so that she could inherit his land as he was a bachelor.

21. When the matter came up for plenary hearing on 27th November 2023, the appellant who appeared in person fully adopted his undated written submissions and made no oral highlights. Miss Kisoo learned counsel for the respondent equally adopted her written submissions dated 16th November 2023 which she did not highlight.

22. It was submitted by the appellant that the elements of the offence of defilement namely: age and penetration were not proved; that no documents were produced as proof of PW2's age; that PW1 who was the complainant's mother did not mention the age of the complainant and neither did PW2 state when she was born. It was further submitted that although the charge sheet stated that the complainant was 4 years old, the Clinical Officer (PW6) ought to have conducted an age assessment.

23. On penetration, the appellant submitted that the evidence on record was insufficient as PW1 had told the court, that on 26th November, 2013, she was attending prayers at Mama Jane's house (PW3), when Mama Jane informed her that one Ndung'u had defiled her daughter and that this evidence was hearsay evidence. It was further submitted that it was unbelievable that PW2, being a child of tender years did not bleed after the intercourse.

24. On the medical evidence, it was submitted that there were contradictions in the medical reports in that from the evidence in the first report, the complainant upon examination did not have any bruises in her genitalia, there was no discharge, and the hymen was intact whereas in the second report, the medical officer found that the complainant was defiled and the hymen was missing. Consequently, it was submitted that this conflicting evidence ought to be resolved in favour of the appellant.

25. Lastly it was submitted by the appellant that his defence was not considered alongside the evidence tendered by the prosecution; that he had been framed up by PW3 due to a land dispute and that failure by the prosecution to rebut his allegations that a grudge existed between him and PW3, his defence had cast doubt on the prosecution's case.

26. On the other hand, it was submitted by the respondent that all the elements for the offence of defilement were proved to the required standard. On age, it was submitted that the charge sheet indicated that the complainant was 4 years and that proof of age in this matter was through PW6, the clinical officer who examined the compliant at Narok District Hospital and he was told by the mother of the victim (PW1), that the complainant was 4 years old.

27. It was further submitted that although the mother of the complainant (PW1) and the complainant (PW2) did not tender evidence of age, the appellant did not challenge this issue in cross examination nor raise any issue that would discredit the age of the complainant. Consequently, it was submitted that there was sufficient, reliable and credible evidence of the Clinical Officer (PW6) to prove that indeed PW2 was 4 years old. For this proposition, reliance was placed on the case of *Mwalango Chichoro Mwanjembe v Republic* (2016) eKLR.

28. On penetration, it was submitted that PW2, who was the victim testified that the appellant was the man who pushed her over his bed, removed her inner wear and inserted his male organ into her female organ causing her to feel pain and that both PW4 and PW5 were eye witnesses.

29. It was further submitted that PW6, the clinical officer who examined PW2 testified that upon examination, he noted that she had a swollen vulva, the hymen was torn with lacerations on the vaginal wall. Consequently, it was submitted that penetration was sufficiently proved through the testimony of the victim, the eye witnesses and the evidence of the medical officer (PW6).

30. Regarding identification of the appellant as the perpetrator, it was submitted that PW2 identified the appellant as the man who defiled her and that PW1 testified that she had lived with the appellant for 5 years as neighbours and that both PW3 and PW5 were well known to the appellant as he was their brother in law. Further, that the offence was committed in broad daylight. Thus, it was submitted that there was no possibility of mistaken identity.

31. Lastly, as regards the contention that the appellant's defence was not analysed against the prosecution's case, it was submitted that the trial court considered the same at page 26 lines 20-28 and page 27 lines 1-17 of the proceedings; that the evidence of the prosecution was overwhelming and was not shaken by the defence raised by the appellant.

32. 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 matters of law only.

33. The above position has been enunciated in several decisions of this Court. In *David Njoroge Macharia v Republic* [2011] eKLR the said mandate was summed up in the following terms:

> "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)."

34. Having carefully gone through the record and the rival pleadings by the parties, we have framed the following 3 main issues for our determination:

    a. Whether the elements/ingredients for the offence of defilement were proved to the required standard?

    b. Whether the two courts below erred in failing to consider the appellant's defence?

    c. Whether the trial court erred in law by sentencing the appellant to life imprisonment?"

35. Turning to the first issue and as to whether all the ingredients for the offence were proved to the required standard, it is now well settled that for a conviction to be founded on a charge of defilement, the prosecution must establish and prove 3 ingredients of the offence as follows: age of the victim, penetration and identity of the appellant as the perpetrator.

36. On the first element of the offence namely age, we have painstakingly gone through the entire record and note that the appellant did not raise the issue of PW2's age during his trial. Additionally, the issue was never raised in his first appeal before the High Court and is therefore being raised for the first time in this appeal. It is true that PW1 who was the victim's mother did not state PW2's age and neither did PW2.

37. Be that as it may, the charge sheet indicates that the appellant defiled a 4-year-old girl. PW6 who was the clinical officer who examined PW2 and produced the P3 Form stated that he had examined a girl aged 4 years and that she got this information from her mother (PW1). PW7, the investigating officer, on the other hand testified that the appellant was attacked by members of the public for defiling a minor aged 4 years. The evidence of these 2 particular witnesses as regards PW2's age remained unchallenged throughout the trial as the appellant did not even cross examine them on the same.

38. In *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No 24 of 2015) (UR) - cited in the case of *Edwin Nyambaso Onsongo v Republic* (2016) eKLR – this Court stated:

> "...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." "We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable." (Emphasis Ours).

39. In the instant case, PW1 who was PW2's mother having told PW6 that PW2 was 4 years, we have no reason to doubt this evidence as it was not discredited by the appellant. Indeed, this age is what was indicated on the charge sheet. In any event nobody could better know the age of her child than a mother and in this case there was no evidence suggesting that PW2 was aged otherwise. Consequently,

we are satisfied that PW2 was aged 4 years as indicated in the charge sheet. We hold and find that PW2's age was proved to the required standard.

40. Turning to penetration, PW2 who was the victim in this case and despite being "too timid" as observed by the trial court broadly testified that she knew the appellant as the man who pushed her over to his bed, removed her inner wear before inserting his male "thing" into her private parts.

41. In the instant case, we take judicial notice of the fact that offences of this nature are normally committed in private and normally, there are no eye witnesses. In this case however, both PW4 and PW5 witnessed the offence being committed and their testimonies remained, firm, consistent and flowed logically and was not even shaken in cross examination.

42. PW4 for example, who was a minor testified that she knew the appellant as the person he saw lifting PW2 onto a bed, removed her clothes and did bad manners to her by inserting his male organ into PW2's, which made her feel pain and that when she saw this she went and told her mother (PW3).

43. In cross examination she remained firm when she stated thus:

> " No one told me what to say."

44. PW5 on the other hand gave a vivid description of what she saw that day. She testified that on 26th November 2013, she was attending a fellowship at PW3's house when PW3' daughter (PW4), came and reported to PW3 that the appellant had taken PW2 to bed and was doing bad things to her.

45. PW3 then requested her to go and verify those allegations and she proceeded to the appellant's house and saw him having carnal knowledge of PW2. In cross examination, she reiterated that the appellant was having sex with PW2 and that the door had not been locked.

46. PW2's evidence that she was defiled by the appellant was corroborated by the testimonies of PW4 and PW5 who witnessed the act and PW6, the medical doctor who examined PW2 and found that she had a swollen vulva, a torn hymen and lacerations which confirmed penile penetration.

47. Turning to the alleged inconsistencies between the P3 Form produced by PW6 and the treatment notes of the private clinician who initially examined PW2 and observed that no penetration was noted and that sperms were outside the vagina, it is our finding that this issue is really neither here nor there as the two courts below considered the same and rendered a reasonable explanation. The learned magistrate for example stated thus when addressing the same:

> "This honourable court has carefully considered the medical evidence tendered and is satisfied that there was cogent and clear proof of penile penetration that was necessary to establish defilement. There was no conflict in the medical evidence because the first clinician made a general and superficial observation of the girl when he only checked for the semen and sperms smeared on the girl's vulva. It is C.O Kiprotich (PW6) (Clinical Officer) who made the detailed medical examination to complete the P3 Form, whose details are set out in a structured format."

48. Additionally, the High Court addressed itself on this issue comprehensively from paragraphs 19-26 of its judgment where the court noted inter alia that it was not clear who treated the minor at the local clinic and that the trial court erred by having PW6 produce the same without confirmation of the details and qualifications of the author. Consequently, nothing turns on this issue.

49. We think we have said enough to demonstrate that indeed there was overwhelming evidence to demonstrate that PW2 was defiled by the appellant and we are satisfied beyond any fear of

contradiction that the second element of the offence namely penetration was proved to the required standard.

50. Turning to the last element of the offence namely; identification of the appellant as the perpetrator of this offence, we note that the identity of the appellant was never in question and he has not even attempted to address us on this issue. The appellant was well known to PW1, PW2, PW3, PW4 and PW5 both as a neighbour and a close relative and the offence was committed in broad daylight. Consequently, we are satisfied that the appellant was properly identified as the perpetrator of this offence.

51. The totality of our findings therefore is that all the ingredients for the offence of defilement were proved to the required standard.

52. The learned judge was further faulted for failing to consider the appellant's defence alongside the testimony of the prosecution. The appellant in his defence stated that he was framed up by PW3 due to a land dispute. We do not find the appellant's defence to be tenable for the following reasons: even if it were to be assumed that there was a grudge between the appellant and PW3, there is no reason why the other witnesses namely PW1, PW2 (the victim), PW4 and PW5 would go ahead and frame him.

53. Further, contrary to the appellant's contention that his defence was not considered, the learned judge rendered herself thus while considering the same:

> " At no time during cross examination did the appellant suggest to PW1 that she and her daughter PW2 were procured to make up a false case against the appellant. And the suggestion itself in this case seems absurd, because from the record of the proceedings, both PW2 and PW4 were very young children who could not possibly keep up with such alleged intrigues."

54. Again at paragraph *27* the judge went on to state:

> " ..... Nothing turns on the alleged grudge between the appellant and PW3. Even without her evidence, the prosecution evidence is overwhelming the appellant was caught in flagrante delicto by PW4 and PW5 while having intercourse with the complainant minor."

55. We fully agree with the reasoning by the learned judge and in our considered opinion the appellant's defence was hollow and a mere denial. Additionally, the contention by the appellant that the prosecution witnesses wanted to use the mob to kill him so that they could inherit his land is not only ridiculous but absurd and is not believable. The appellant's evidence taken vis- a- vis the prosecution's evidence which was overwhelming did not in any way dislodge the evidence tendered by the prosecution. Consequently, we find no merit in this ground of appeal and we accordingly reject it.

56. 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. It was the appellant who defiled PW2 and no one else.

57. 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.

58. Turning to sentence, the appellant submitted that the trial court erred in law by awarding a mandatory life sentence as provided for in the *Sexual Offences Act* and failed to note that he was a first offender.

59. The appellant was sentenced to life imprisonment which is the mandatory minimum sentence provided under Section 8 (1) (2) of the *Sexual Offences Act* No 3 of 2006. The sentence was therefore lawful.

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

We so order.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY AUGUST, 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