Tarus v Republic (Criminal Appeal 37 of 2018)
[2023] KECA 32 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KECA 32 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 37 OF 2018

F SICHALE, LA ACHODE & WK KORIR, JJA

JANUARY 26, 2023

BETWEEN

MICHAEL KIPKEMOI TARUS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of G.K Kimondo J, dated 13/12/2016)

JUDGMENT

1. This is the second appeal of Michael Kipkemoi Tarus the appellant herein. He was first convicted in the magistrate's court for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* (SOA). The particulars of the offence were that between the 2nd and 15th day September, 2014 the appellant, while in [Particulars Withheld] sub- location within Nandi County, intentionally and unlawfully caused his penis to penetrate the vagina of FJ a child aged 5 years.

2. The appellant denied the charges against him and the respondent presented 8 witnesses to prove their case.

3. The background of the case is that on the stated date, FJ was on her way to school when a man accosted her and took her to his house where he removed her pair of shorts and his long trousers and touched her vagina. FJ was too young to explain well to the court what the assailant did to her, but she described that she felt something like a finger getting into her vagina. When it was all over the man told her to go to school.

4. The minor testified that the said man had defiled her before and promised to buy her Kangumu, (a bun) and was a person well known to her. The minor later on revealed what had transpired to PW2, her older sister C, and identified that man as the appellant. PW2 in turn, relayed the information to PW3 their mother, NC.

5. Upon confirming from PW1 that she had been defiled, PW2 took her to Kabiyet District Hospital and also made a report at Kabiyet Police Station. She told the court that the complainant was four years old at the time of the incident and produced the complainant's immunization card in evidence. She also confirmed that the appellant was well known to her and had been a neighbor to her family for a period of about ten years.

6. PW4, Barnabas Tirop Ruto the village elder of the area from which the appellant hailed, told the court that the appellant had been known to him for about 15 years at the time of his arrest. He arrested the appellant at Sinet on September 23, 2014 and escorted him to Kabiyet police station, following a warrant for his arrest, which PW4 received from Kabiyet police station.

7. PW6, Paul Ngetich Birgen was the clinical officer at Kabiyet Health Center who examined the complainant on September 22, 2014. He confirmed that the minor was four years old at the time of examination. He testified that upon examination of the minor he found injury to her genitalia that was about a month old. He also found a broken hymen and the presence of infection and inflammation which was evident from the shedding of pus cells in the minor's urine. He concluded that the minor had been penetrated.

8. In his defence the appellant testified without oath and denied the charges. His testimony was that PW3 had framed him when he demanded the arrears owed to him and indicated that he intended to terminate his services to her. He asserted that he knew nothing about the charges facing him.

9. Upon considering the evidence tendered on both sides, the trial court found that the appellant's defence had not shaken the testimony of the respondent's witnesses in any way and that the case for the respondent had been proved beyond reasonable doubt. The appellant was consequently convicted and sentenced to life imprisonment in accordance with section 8(1) as read with 8(2) of the *SOA*.

10. Aggrieved by the above conviction and sentence, the appellant filed an appeal in the High Court alleging that; the charge was not proved beyond reasonable doubt; the evidence of the appellant was completely disregarded; the evidence tendered by the prosecution was inconsistent, inconclusive and unreliable; the court shifted the burden of proof from the prosecution onto the appellant and his mitigation was not considered in sentencing him.

11. At the hearing, the learned counsel for the appellant departed from the grounds they filed and submitted that the appellant did not comprehend the proceedings; that the voire dire examination was improper; that the identification of the appellant was doubtful; that penetration was not proved and that the evidence of the complainant and that of the doctor was inconsistent or unreliable. He urged the court to find that the conviction was unsafe and allow the appeal.

12. The appeal was contested by the respondent, who asserted that they had proved the charge against the appellant beyond reasonable doubt. Further, that the appellant was positively identified by the complainant and penetration was proved through credible medical evidence. Lastly, that the defence and mitigation put forward by the appellant was duly considered by the court.

13. Upon considering the arguments and the evidence on the record before him, the learned Judge held that the charge and all its elements was proved beyond reasonable doubt, and that the burden of proof did not shift to the appellant at any point in the proceedings. He also pointed out that under section 8 (2) *SOA*, defilement of a child of eleven years or below attracts a sentence of imprisonment for life. Further, that the record shows that the appellant's mitigation was duly considered before sentencing. He found no merit in the appeal and dismissed it in its entirety.

14. Unbowed, the appellant filed the instant appeal in the Court of Appeal against the findings of the superior court below, raising completely new grounds that are different from those he raised in his first appeal. He now alleges that:

> " i. the charge sheet was contrary to section 214 of the *Criminal Procedure Code*;
>
> ii. The appellant was not accorded a fair trial as provided by Article 25 (c) and article 50 (2) of the *Constitution*,
>
> iii. Section 124 of the *Evidence Act* and section 19 (1) of the *Oaths and Statutory Declaration Act* were violated;
>
> iv. There was no sufficient evidence to associate the breakage of the complainant's hymen with the appellant;
>
> v. The Judge failed to consider the existence of a grudge between the appellant and the victim's mother;
>
> vi. The Judge erred in upholding the trial court's false inference and failing to appraise the evidence of the individual prosecution witnesses in the judgment to appreciate contradictions therein;
>
> vii. Most of the critical witnesses did not testify;
>
> viii. The superior Court failed to re-evaluate and analyze the evidence on record afresh to draw its own conclusions;
>
> ix. The defence statement was not given adequate consideration;
>
> x. No scientific or DNA test was conducted on the appellant to ascertain that he committed the offence."

15. The appeal was disposed of by way of written submissions which were orally highlighted in the virtual Court. The appellant who appears in person filed written submissions which are undated. He submits that there existed a grudge between him and the victim's mother, that caused her to concoct the case against him. He also urges that the evidence adduced against him was not consistent. He also prays for a reduced sentence.

16. Learned State Counsel Ms. Limo representing the State, filed submissions dated April 22, 2022 in opposition. Her argument is that the appellant having not indicated how any of his rights were violated, this Court should find that the appellant's right to fair hearing was not violated. Counsel also contends that all the elements of defilement were proved to the required standard and the appellant was properly convicted and sentenced in view of the age of the minor.

17. We have considered the record of appeal, the rival submissions made by the parties herein, and the law and the issues that arise for consideration in this appeal are:

    i. Whether the appellant's rights under Article 25 (c) and 50 (2) of the *Constitution* were violated;

    ii. Whether the trial court contravened the provisions of Sections 214 of the *Criminal Procedure Code*, 124 of the *Evidence Act* and 19 (1) of the *Oaths and Statutory Declarations Act*.

    iii. Whether the Judge re-evaluated the evidence afresh to draw his own conclusion that the prosecution had proved its case to the required standard;

iv. Whether the defence raised by the appellant was considered; and

v. Whether the mandatory sentence is Constitutional.

18. This is a second appeal, and as stated in *Kavingo vs R*, (1982) KLR 214, a second appellate court will not interfere with concurrent findings of fact of the two courts below, unless they are shown not to have been based on evidence. The Court was quoting its holding in *Chemagong vs R* (1984) KLR 213, where it was stated as follows;

> " A second appeal must be confined to points of law and this Court will not interfere with the concurrent findings of fact arrived at in the two courts below, unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did."

19. On the first issue the appellant faults the two courts below for infringing his right to fair trial as stipulated in Article 25 (c) and 50 (2) of the *Constitution of Kenya, 2010*. The respondent has opposed this allegation and contends that the appellant has not clearly stated how his right to fair trial was violated, and that this issue was not raised in the trial court or the 1st appellate Court. The respondent is urging us to find that the appellant's right to fair trial was not violated.

20. On this issue we are guided by the oft cited decision in *Anarita Karimi Njeru vs Republic* (1976 -1980) KLR 1272 where it was established that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify those rights with precision and how they have been, or will be infringed in respect to him or her. This was restated in *Matiba vs AG* (1990) KLR 666 as follows:

> " An applicant in an application under section 84(1) of the Constitution is obliged to state his complaint, the provisions of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of the court under the section. It is not enough to allege infringement without particularizing the details and manner of infringement"

21. In the instant case the appellant made a sweeping statement that his rights under Article 25 (c) and 50 (2) of the *Constitution of Kenya, 2010* were violated, without demonstrating which rights and how the said rights were violated. It is noted that Article 50 (2) enumerates a slew of rights that provide the ingredients that make up a fair trial. The appellant having not demonstrated with any particularity which of those rights and in what manner they were infringed, this ground must fail.

22. We collapsed the appellant's grounds no 1 and 3 into the second issue, which is whether the trial court contravened the provisions of Sections 214 of the Criminal Procedure Code, 124 of the *Evidence Act* and 19 (1) of the *Oaths and Statutory Declarations Act*, in the manner in which the trial was conducted.

23. Section 214 of the *Criminal Procedure Code*, deals with variance between the charge and the evidence and also with amendment of charges. A variance occurs where the charge contained in the charging instrument differs from the charge of which the accused is convicted. This can be such as where the particulars are unchanged but the evidence adduced during the trial proves facts that are materially different, or an amendment is made which changes an essential element of the charged offence thereby altering the substance thereof.

24. The appellant has not demonstrated that from the record, the evidence adduced proved facts that were materially different from those stated in the charge sheet, or that amendments were made which

changed an essential element of the charged offence thereby altering its substance. The appellant's complaint being deficient on specificity and how these provisions were contravened these grounds must collapse.

25. With regard to sections 124 of the *Evidence Act* and 19 (1) of the *Oaths and Statutory Declarations Act*, section 124 of the *Evidence Act* stipulates that:

> " Notwithstanding the provisions of section19 of the Statutory and Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."

26. It is however observed that more often than not, offences of defilement are perpetrated when the assailant is alone with the victim. The proviso to section 124 was enacted to address the difficulty of procuring the corroborative evidence as demanded above in sexual offences. The proviso to section 124 states that:

> " Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall 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."

As a result, we find that the trial court properly applied the provisions of section 124 when it relied on the evidence of the minor on identification and the superior court was in order to uphold that finding.

27. The third issue is whether the Judge in the first appellate court re-evaluated the evidence afresh to draw his own conclusion, that the respondent had proved the charge of defilement against the appellant beyond reasonable doubt.

28. We have discussed grounds number 4,6,7,8, and 10 under the umbrella of this issue. In other words, the appellant is inviting this Court to find that if the superior court re-evaluated the evidence afresh to draw its own conclusions, it would have found that there was insufficient evidence to connect the appellant to the broken hymen in the minor, since no DNA test was conducted. Further, that the prosecution witnesses contradicted themselves and lastly that most of the critical witnesses did not testify.

29. The ingredients required to prove the offence of defilement under Section 8 (1) *SOA* were stated in *George Opondo Olunga vs. Republic* (2016) e KLR and reiterated in *John Mutua Munyoki v Republic* [2017] eKLR, which held that:

> " For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:
>
> I. The victim must be a minor
>
> II. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice."

30. The victim in the case before as was said to be a four years old minor. In *Edwin Nyambogo Onsongo v Republic* (2016) e KLR this Court held that:

> " ...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 guardians or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable"

31. PW3 produced the minor's immunization card in evidence as proof that she was four years old at the time of the assault. PW6 confirmed that she was indeed, four years old upon examining her and the appellant did not dispute the age of the minor.

32. Regarding the identity of the person who defiled the minor, we have considered the evidence on record and specifically that of PW1, PW2 and PW3 as set out elsewhere in this judgement. This was to determine whether the two courts arrived at the correct conclusion that the evidence adduced by the respondent, proved beyond reasonable doubt that it is the appellant and no one else who defiled the minor.

33. It is not in dispute that the minor and the appellant were known to each other prior to the assault. The minor testified that the appellant had defiled her before and promised to give her Kangumu, (a bun) and that he was well known to her. The consistency of the evidence of the minor is evident from the fact that in her report to PW2 she identified the appellant as the person who had defiled her and that he had done it before. The evidence of a previous assault was confirmed by PW6 who found an injury that was about a month old upon examination. We are therefore, satisfied with the assessment of the evidence on identification by the superior court.

34. On penetration F.J. testified that she was on her way to school when the appellant accosted her and took her to his house, where he removed her pair of shorts and his long trousers and touched her vagina. As stated elsewhere in this judgement F.J. was too young to elucidate what the appellant did to her, but she recalled feeling something like a finger getting into her genitals.

35. Penetration is defined under section 2 of the *Sexual Offences Act* as:

> " the partial or complete insertion of the genital organs of a person in to the genital organs of another person.

Such penetration need not therefore, be complete or absolute. Partial penetration will suffice.

36. In *Bassita v Uganda* S.C Criminal Appeal No. 35 of 1995, quoted with approval in *MK v Republic* (2017) eKLR, the Supreme Court of Uganda held thus on the evidence of penetration:

> " the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt"

37. In the instant case, PW6 testified that when he examined the complainant's genitalia he found a broken hymen and an injury that was about a month old. He also testified to the presence of infection and inflammation which led to the shedding of pus cells in the urine. He arrived at the professional conclusion that there was penetration.

38. Both the trial court and the superior court found the evidence of the minor to be credible and it was supported by that of PW6. Failure to conduct a DNA test on the appellant was therefore, not fatal to the respondent's case. The number of witnesses who should be called is not cast in stone. Both the prosecution and the defence are at liberty to call the number of witnesses they would like, to prove their case.

39. The two courts below accepted the evidence of the respondent's witnesses and found that it was sufficient to prove the case. They rejected the evidence of the Appellant. They found that the respondent had proved the age of the minor, the penetration and the identity of the perpetrator and the charge had therefore been proved. We have no basis to upset their finding.

40. On whether the defence raised by the appellant was considered by the two courts, the appellant complains that his defence that there existed a grudge between him and PW3 the mother of the minor was not considered. It is trite law that the legal burden of proof lies throughout with the prosecution. See *Bhatt v Republic* (1957) E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166. In *Woolmington v DPP* (1935) AC462, the court stated:

> " But while the prosecution must prove the guilt of the prisoner, there is no such laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury to his innocence. Throughout the wees of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilty."

41. The appellant was under no obligation to state his case to prove his innocence. Having exercised his right to testify however, it was imperative that the court considers that evidence alongside all the other evidence on record to establish whether it raised a reasonable doubt. We have perused the record of appeal before us and it is evident on the face thereof that the defence was considered by both courts.

42. The learned trial magistrate at page 63 of the record rendered himself thus:

> " I have carefully analyzed the defence of the accused and I have noted that all the accused stated was that he was framed up and to deny the offence with which he was charged. His allegations that he was framed up because he claimed his money that PW3 owed him after he said that he wanted to stop working at the home of the complainant's family is just an afterthought because such allegations were never raised by the accused when he was cross examining PW3."

And the sentiments of the learned Judge are captured at page 98, paragraph 24 of the record of appeal, as here under:

> " the defence set up by the appellant is a sham. I am not satisfied about the allegations of a vendetta made by the appellant. True, the appellant was employed at a hotel ran by the complainant's relatives. There may have been arrears of his wages. However, there is no tangible evidence that the appellant was framed up by the complainant or her immediate family"

43. From the foregoing it is clear that the two courts below considered the appellant's defence, in the context of the rest of the evidence on record and found that it did not debunk the respondent's case. We find no reason to interfere with their findings.

44. We have carefully considered the evidence on record, the analysis by the trial and superior court, the grounds of appeal and the rival arguments in the appeal before us and the law. We find that both courts analyzed the evidence before them properly on all the ingredients of this offence. We find no evidence that any error or misdirection of fact or law occurred during the trial or at the first appeal to warrant this Court's interference with the findings of the two courts below.

45. On the sentence imposed upon the appellant, the two courts below held that under Section 8 (2) of the *Sexual Offences Act*, defilement of a child of eleven years and below attracts imprisonment for life, and that the sentence is mandatory. The mitigation tendered by the appellant was that he was a first offender aged 22 years. In his oral submissions the appellant urged this Court to reduce his sentence on account of his young age at the time of sentence. The respondent opposed his plea and contended that the sentence was safe since the victim was a child of 5 years.

46. In *S vs. Toms* 1990 (2) SA 802 (A) at 806 (h) – 807 (b), the

South African Court of Appeal (Corbett, CJ) held that:

> " The infliction of punishment is a matter for the discretion of the trial court. Mandatory sentences reduce the court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant"

47. We agree with the above decision and accordingly reduce the sentence of the appellant to 30 years. The sentence will run from the time of incarceration. In the circumstances this appeal is allowed only on sentence.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF JANUARY, 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR