Libese v Republic (Criminal Appeal 99 of 2019)
[2023] KECA 153 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 153 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 99 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

FEBRUARY 17, 2023

BETWEEN

EVANS SHITO LIBESE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Eldoret, (Kemei J), dated 22nd November 2018 IN HC. CRA NO. 77 of 2017)

JUDGMENT

1. Evans Shito Libese (the appellant herein), has preferred this second appeal against the judgment of Kemei J dated 22nd November 2018, in which he had been charged at the Chief Magistrate's Court in Eldoret with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the offence were that on August 31, 2016, at [Particulars Withheld], he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of FC a child aged 7 years.

3. The appellant further faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the same *Act*.

4. The particulars of the alternative charge were that at the same time and place, he intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of FC a child aged 7 years.

5. The appellant denied the charge after which a trial ensued. In a judgment delivered on July 14, 2017, Hon E Kigen (the then Resident Magistrate Eldoret law courts), convicted him of the main charge and sentenced him to life imprisonment.

6. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on November 22, 2018, Kemei J, found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

7. Unrelenting, the appellant has now filed this appeal and probably the last appeal vide a notice of appeal filed in court on December 6, 2018, and two sets of undated homemade amended grounds of appeal which are somewhat repetitive and which can be summarized as follows:

    1. That he was not accorded a fair trial as per the *Constitution*.

    2. That the prosecution's evidence was contradictory.

    3. That penetration was not proved beyond reasonable doubt.

    4. That the learned judge erred in law by not observing that section 36 of the *Sexual Offences Act* was not complied with.

    5. That the learned judge erred in law by not observing that his defence was ignored contrary to section 169 (1) of the *Criminal Procedure Code*.

8. Briefly, the background to this appeal is that on August 31, 2016, FC was playing with her friend called T when the appellant whom she referred to as Evans called her and took her to the river promising her Kshs 30 and did bad manners to her.

9. It was her evidence that the appellant removed her shorts and also removed his trouser, removed his penis and inserted it to her vagina. She later went home and reported the incident to her mother (PW2). The appellant had warned her that he would slaughter her if she told her parents what had transpired.

10. PW2 was JN the complainant's mother. It was her evidence that on August 31, 2016, she arrived home at 12;00PM and found her child (PW1) crying. PW1 then told her that somebody had done to her bad manners. She examined her and took her to Moi Teaching and Referral Hospital, where she was treated. PW1 was bleeding from her private parts. They then went back home and PW1 showed her the appellant's house which they noticed the appellant had vacated from the previous night and shortly thereafter the appellant emerged and PW1 pointed at the appellant.

11. The appellant then stated that she would kill both of them and members of the public intervened forcing the appellant to flee. He later surrendered himself to the police station whereupon he was arrested.

12. PW3 was Eunice Talit a medical officer from Moi Teaching and Referral Hospital. She produced a P3 Form filled by Dr Yatich in respect of PW1. According to the P3 Form, PW1 had narrated of having been defiled by someone known to her. On examination, the head and neck were normal, the hymen was broken, there were dry wounds and discharge stained with blood, there was presence of pus cells and bacteria and both syphilis and HIV tests were negative. There was also bruising on the hymen an indication that PW1 had been defiled.

13. PW4 was corporal Anthony Kiilu attached to Yamumbi police post. He testified that on September 2, 2016, he was at the station when PW1 came accompanied by her mother (PW2) and that PW1 could not walk and was being carried by the mother. PW2 reported that PW1 had been defiled by one Evans who was a neighbor. He later recorded statements of the witnesses and both PW1 and 2 reported that the appellant had threatened them.

14. Put to his defence, the appellant elected to give a sworn statement and called no witnesses. He denied having committed the offence and stated inter alia that he had a grudge with PW2, who made his first

wife to leave him and that at one point, PW2 had borrowed Kshs 10,000/= from him and when he refused, she insulted him and called him a habitual rapist who had run from home.

15. When the matter came up before us for plenary hearing on October 19, 2022, the appellant who was in person sought to entirely rely on his written submissions and further stated that he had nothing to add. Ms Githaiga on the other hand, for the respondent sought to rely on her written submissions dated March 2, 2021, which she briefly orally highlighted in court.

16. We have considered the record, the rival oral and written submissions, the authorities cited and the law. The issues raised before us in this appeal are rather straight forward.

17. 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 only matters of law. In *Kados v Republic* Nyeri Cr Appeal No 149 of 2006 (UR) this court rendered itself thus on this issue:

> "...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

18. In *David Njoroge Macharia v Republic* [2011] eKLR it was stated that under section 361 of the *Criminal Procedure Code*:

> "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)."

19. With regard to the first ground of appeal, the appellant contended that he was not accorded a fair trial as per the *Constitution* as he was not supplied with witness statements. On the other hand, it was submitted for the respondent that the appellant had not clearly stated what constitutional rights were violated hence the respondent could not go ahead and speculate and that further, the appellant was presented before court within the stipulated 24 hours and that his trial was without delay as it was concluded in less than an year and that further he had been supplied with witness statements and the same clearly recorded by the trial court and that from the foregoing, it is evident that indeed his constitutional rights were not violated.

20. We have carefully gone through the record and the rival submissions by the parties, though the appellant does not state specifically how his constitutional rights were violated, we discern that he is complaining that he was not supplied with witness statements.

21. The record herein shows that when the appellant was first arraigned in court on September 8, 2009, before Hon TW Cherera CM (as she then was), the court on its own motion directed that he be supplied with witness statements. On September 22, 2016, the appellant informed the court that he did not have witness statements whereupon the court slated a mention date on September 28, 2016, for confirmation of the same. It is not clear from the record what transpired on September 28, 2016. On October 6, 2016, the appellant's plea was "I pray for witness summons and the charge sheet" and the court (Hon S Telewa) directed that "witness summons and charge sheet to issue at clear (sic) costs".

22. When the matter came up again for further hearing on 24th October 2016, the appellant again requested that he be supplied with witness statements and the prosecution informed the court that the same had been supplied. There was no response on part of the appellant and it would appear the matter was put

to rest there as the appellant never raised this issue again and it would therefore be proper to assume that indeed the same had been supplied as contended by the prosecution.

23. Even assuming that they were not supplied as contended by the appellant, faced with a similar situation, this court in *Simon Ndichu Kahoro v Republic* NRB CA Criminal Appeal No 69 of 2015 [2016] eKLR, stated as follows:

> "We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of the Constitution, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case."

24. In the instant case, the appellant was informed of the charges he was facing, he denied the same and he ably cross examined the prosecution witnesses and even tendered his defence. Turning to one of the other ground of appeal in the other set of the appellant's grounds of appeal which is related to this ground of appeal namely; that the appellant was not informed of his right of being represented by counsel as per article 50(2)(g) of the *Constitution*, this was comprehensively and conclusively addressed by the learned judge. She stated:

> "The Court of Appeal held the opinion that the state ought to provide legal representation to accused faced with a capital offence. That the same can also be availed through a case by case basis ie where there exists complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that. representation be provided. It is my considered view the case at hand bears no complex issues and is not of public interest. I note also that the appellant understood the charge and the case in particular and was able to conduct his case. I find that he was not prejudiced by lack of representation thereby his right to legal representation was not infringed by the trial court's failure to inform him of the same. That ground therefore fails."

25. We are in agreement with the above summation of the judge and find that nothing turns on this point.

26. Turning to the second ground of appeal, the appellant contended that the evidence of the prosecution witnesses was contradictory. More specifically, the appellant submitted that PW1 and PW2 contradicted themselves. Respectfully, we have gone through the record and we are unable to agree with the contention by the appellant that the evidence of these two witnesses was contradictory. On the contrary, it remained firm, consistent and credible even under cross examination. PW1 gave a vivid account of how she was defiled by the appellant whereupon she went home and narrated the incident to her mother (PW2). PW1's evidence that she had been defiled was corroborated by the evidence of PW4 the medical doctor who examined her and indeed confirmed that she had been defiled and her hymen was broken.

27. The contention by the appellant that PW1 was playing while sick and that she could not have walked home while bleeding is really without basis. Likewise, the contention by the appellant that Trizah, the child who was playing with PW1 should have heard PW1 scream are contestations of fact which cannot be subject of appeal on a second appeal before this court.

28. In any event, the said T was not there when PW1 was being defiled as the appellant called PW1 and took her to the river. This ground of appeal therefore fails in its entirety.

29. Turning to the issue that penetration was not proved beyond reasonable doubt, PW1 gave a detailed account of how she was defiled by the appellant when she testified inter alia thus;

> " He removed my shorts and also removed his trouser. He removed his penis and inserted into my vagina (pointing at her vagina). I felt a lot of pain. He thereafter asked me to go home."

30. PW2 corroborated PW1's evidence when she testified that she found her crying and that she told her that somebody had done bad manners to her and that she was bleeding from her private parts. The same was corroborated by the findings on the P3 Form prepared by PW3 which showed upon examination that the hymen was broken, there was dry blood wounds and discharge stained with blood. There was also bruising on the hymen and PW3 confirmed that indeed PW1 had been defiled.

31. In light of the above and contrary to the appellant's submission, penetration was proved beyond any reasonable doubt and as a matter of fact the hymen was broken. Accordingly, this ground of appeal is without merit and the same fails in its entirety.

32. The learned judge was further faulted for not observing that section 36 of the *Sexual Offences Act* was not complied with. The learned judge while addressing this issue rendered himself thus;

"section 36 of the *Sexual Offences Act* provides:

> " notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this act, the court may direct for the purpose of forensic and other scientific testing including a DNA test, in order to ascertain whether or not the accused person committed the offence.
>
> This section is not in mandatory terms. Under the circumstances of this case, I do not find that the appellant was in any way prejudiced by the trial court's failure to order for a DNA test. That ground fails."

33. From the above passage which we have quoted from the judgment of the learned judge, nothing could be far from the truth. It is quite evident that indeed the learned judge considered the provisions of the impugned section and found that the trial court's failure to order for a DNA test was not prejudicial to the appellant. The evidence in this case overwhelmingly pointed to the appellant as the perpetrator and in fact he does not seem to challenge the fact that he is the one who defiled PW1.

34. Lastly, the learned judge was faulted for allegedly not observing that the appellant's defence was not considered contrary to section 169 (1) of the *Criminal Procedure Code*.

35. section 169 (1) of the *Criminal Procedure Code* cap 75 of the Laws of Kenya provides as follows;

> "169(1) Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."

36. In the instant case the learned trial magistrate set out the issues for determination as follows:

"1. Was the complainant defiled on August 31, 2016?

2. Was the complainant defiled by the accused?

3. Has the offence of defilement been proved?

4. Defence adduced."

37. The learned trial magistrate then proceeded to deal with the issues he/she framed for determination one by one. Regarding the appellant's defence he/she stated thus:

> The accused merely denied committing the said offence. He did not give any evidence to displace the evidence of the prosecution witnesses. The witnesses lined up before court were credible witnesses and as such I find that it is the accused who had defiled the complainant. This was further supported by the medical evidence."

38. Nobody could have said it better than the learned trial magistrate who had the advantage of seeing the witnesses testify and we will say no more regarding this issue.

39. From the circumstances of this case, 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, it is our view that there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement and we find that all the three ingredients for the offence of defilement were proved.

40. Accordingly, we find and hold that the appellants' conviction for the offence of defilement was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant's appeal on conviction.

41. Regarding sentence, the appellant defied a 7-year-old innocent child and was handed the mandatory life sentence as provided for section 8 (2) of the *Sexual Offences Act* No 3 of 2006, which sentence is no doubt lawful as provided for in the Act.

42. PW1 stated that after commission of the offence, the appellant threatened that he would slaughter her if she told her parents what had transpired. PW2 also stated that the appellant threatened to kill both PW1 and PW2 prompting members of the public to intervene.

43 The evidence of these two witnesses that they were threatened was corroborated by PW4, who confirmed that indeed they had recorded statements over the same. It would appear that the appellant was not remorseful and he did not regret his actions.

44. Taking into totality all the circumstances in this case, we consider the circumstances under which this offence was committed to be aggravated and in our considered opinion, the appellant doesn't deserve any mercy to warrant us to exercise our discretion in his favour to disturb/reduce the sentence.

1. Accordingly, the appellant's appeal is without merit and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF FEBRUARY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR