Lusamoywa v Republic (Criminal Appeal 61 of 2018)
[2023] KECA 126 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KECA 126 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 61 OF 2018

F SICHALE, LA ACHODE & WK KORIR, JJA

FEBRUARY 10, 2023

BETWEEN

PATRICK MANDIRA LUSAMOYWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Eldoret, Kimondo J, dated 19th April 2016) in HC. CRA No. 185 of 2013)

JUDGMENT

1. Patrick Mandira Lusamoywa (the appellant herein), has preferred this second appeal against the judgment of Kimondo J dated April 19, 2016, in which he had been charged at the Chief Magistrate's Court at 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 October 18, 2011, at (particulars withheld), he caused his genital organ (penis)to penetrate the genital organ (vagina) of LC a child aged 5 years.

3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to the provisions of section 11 (1) of the same *Act*. The particulars of the offence were that at the same time and place, he intentionally allowed his genital organ to come into contact with the genital organ (vagina) of LC a child aged 5 years.

4. The appellant denied the charge after which a trial ensued. In a judgment delivered on September 27, 2013, hon A Alego (the then Principal Magistrate Eldoret law courts), convicted him of the main charge and sentenced him to life imprisonment.

5. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on April 19, 2016, Kimondo J, found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

6. Unrelenting, the appellant has now filed this appeal and probably the last appeal *vide* a notice of appeal dated May 3, 2016 and his homemade supplementary grounds of appeal filed in court on January 4, 2022, raising the following grounds of appeal:

> "
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> 1. That, the learned trial judge erred in law by upholding the appellant's conviction and sentence of life imprisonment but failed to note that, the sentence, awarded in mandatory nature without considering that, the appellant had no given any mitigation, this went to the root of the prosecution case.
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> 2. That the learned judge erred in law by upholding the appellant's conviction and sentence of life imprisonment but failed to note that the charge was defective, the omission of the words, unlawfully and intentionally are missing thus this was a defect which could not be cured by section 382 of the *Criminal Procedure Code*. Thus the charges could not support conviction and a sentence of life imprisonment.
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> 3. That the learned trial judge erred in law by upholding the appellant's conviction and sentence but failed to note the charge of defilement was not proved against the appellant.
>
> 4. That failure to consider the appellant's defence alongside the prosecution's evidence to a misdirection to court, this was fatal to prosecution's case."

7. Briefly, the background to this appeal is that on October 18, 2011, PW1, a child then aged 5 years was going home from school at midday when he met the appellant who told her that he would buy her a "*ndazi*". He then took her to a house which had no door, removed her panty, laid her on the floor of the house and put his penis on her vagina. The appellant then left and PW1 went home and told her mother (PW2), what had transpired. She was later taken to hospital. The appellant was subsequently arrested by her mother's friends. She did not know where the appellant stays.

8. PW2 was EC, PW1's mother. It was her evidence that on October 18, 2011, she was at Huruma where she stays when she left for Kipkaren where her daughter lived with her (PW2's) sister. That, when PW1 came from school, she (PW1) asked her if she had medicine as her private parts were painful. Upon examining her, she noted that her private parts were bruised and she took her to hospital. PW1 then told her that a person who had promised her to buy her a "*ndazi*" had defiled her. On October 20, 2011, she went back to her sister's place and her daughter (PW1) recognized the appellant "instantly". She was then issued with a P3 form which was duly filled and returned.

9. PW3 was APC Kamaya Myckdot. It was his evidence that on October 18, 2011, he was at Pioneer AP camp on duty when PW2 came with her daughter (PW1) alleging that she had been defiled. The next day, PW2 led him to the suspects house whereupon they arrested and interrogated him and later recorded statements.

10. PW4 was dr Cynthia Kibet, a medical officer at Moi Teaching and Referral Hospital. She testified of having examined PW1, a girl aged 5 years who gave history of defilement. Upon examination, she found

that her genitalia was red and bruised and she had a tear on upper aspect of left labia manora with a tear on her hymen. There was no vaginal discharge, HIV test was negative, pus cells were detected but there were no sperms. It was her further evidence that there was positive evidence of penetrative vaginal injury.

11. PW5 was PC Mohammed Ali attached to Yamumbi Police Post. It was his evidence that on October 20, 2011, he was on duty when a suspect was brought to the Police Station and he recorded a statement from the complainant and placed the suspect in custody and later charged him.

12. The appellant gave a sworn statement of defence and called one witness. He denied having committed the offence and further stated that his pleas to be subjected for medical examination fell on deaf ears.

13. When the matter came up for plenary hearing on October 17, 2022, the appellant who was in person sought to rely on his written submissions dated September 28, 2021, which he briefly orally highlighted. Ms Githaiga on the other hand, for the respondent sought to rely on her written submissions dated October 12, 2022, which she also orally highlighted.

14. We have considered the record, the rival oral and written submissions, the authorities cited and the law.

15. 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 vs 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 ..."

16. Similarly, in *David Njoroge Macharia vs 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 vs Republic* [1984] KLR 213)."

17. Having re-evaluated the totality of the evidence on record, we are of the considered opinion that the standard of proof beyond reasonable doubt was not met for the following reasons. PW1 in her evidence in chief stated that the appellant was arrested by her mother's friends. These *"friends"* did not testify. PW2 on the other hand stated that when she went back to Kipkaren on October 20, 2011, PW1 recognized the appellant "instantly". PW1 did not give description of any kind of the appellant to her mother at the time that she reported the incident. Additionally, the arresting officer, PW3 told the trial court that it was PW2 who led him to the house of the appellant where they arrested him from. It is noteworthy to state that PW2 did not make such a claim. Suffice to state that PW1 told the trial court that the appellant was arrested by her "mother's friends", PW2 on the other hand told the court that PW1 recognized the appellant "instantly". It is also important to point out that PW1 told the court that she did not know where the appellant lived. The unanswered question is, who led PW3 to the house of the appellant? PW3 says it was PW2. How did PW2 know where the appellant lived as PW1 told the court that she did not know where the appellant lived? It would also appear that PW1 may not have been there when the appellant was arrested as her brief statement was that the appellant was arrested by PW 2's friends. Given that PW1 may not have known that PW3 was a law enforcement officer and hence he would qualify as "PW2's friends", who led PW3 to the house of the appellant?

18. It cannot be gainsaid that to found a conviction in a criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy.

19. On proof beyond reasonable doubt, this court in *Stephen Nguli Mulili v Republic* [2014] eKLR: stated as follows:

> It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP v Woolmington*, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa v R*, [2013] eKLR."

20. In the case of *Miller v Ministry of Pensions*, [1947] 2 All E R 372, Lord Denning stated as follows with regard to the degree of proof beyond reasonable doubt:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

21. Applying the above principles to this appeal, we are of the considered opinion that the standard of proof beyond reasonable doubt was not met. The prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution case raising material doubts, must be in favour of the appellant.

22. Having considered the appeal, submissions and the law, and from our own re-assessment and re-evaluation of the evidence, we are satisfied that there was doubt as to whether it is actually the appellant who defiled the complainant, which doubt should be resolved in his favour.

23. Consequently, we allow this appeal, quash the conviction and set aside the sentence meted out on the appellant. The appellant is hereby set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY, 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