Severin v Republic (Criminal Appeal 180 of 2018)
[2023] KECA 355 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 355 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 180 OF 2018

F SICHALE, LA ACHODE & WK KORIR, JJA

MARCH 31, 2023

BETWEEN

HENRY SEVERIN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kitale, (Chemitei J), dated 10th May 2018) IN HC. CRA NO. 97 OF 2016)

JUDGMENT

1. Henry Severin (the appellant herein), has preferred this second appeal against the judgment of Chemitei, J dated May 10, 2018, in which he had initially been charged at the Chief Magistrate's Court in Kitale 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 diverse dates between December 29, 2014 and January 6, 2015, at (particulars withheld), he intentionally caused his penis to penetrate the vagina of VCB a child aged 8 years old.

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 touched the vagina of VCB a child aged 8 years.

4. The appellant denied the charge after which a trial ensued. In a judgment delivered on October 13, 2016, Hon Cheruto C, Kipkorir (then Resident Magistrate), 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 May 10, 2018, Chemitei 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 his homemade undated grounds of appeal filed in Court on May 22, 2018, raising 4 grounds of appeal. Subsequent thereafter, the appellant filled "amended grounds of appeal" raising the following grounds:

    1. That the learned trial magistrate erred in law and fact by failing to appreciate that the appellant was not represented by an advocate nor informed of his right to legal representation at the state's expense pursuant to Article 50 (2) (g) of the *Constitution*.

    2. That the learned justice erred in law failing to find time had elapsed for a legal medical examination of the child. (Sic).

    3. That the learned justice erred further in law by failing to point a case without occurrence book number is not tenable (Sic).

    4. That the learned justice further erred in points of law that an absolute crucial witness was not enrolled for summons. (Sic)

    5. That the learned justice still further erred did not observe the credibility of behaviour of the child. (Sic)

    6. That the learned justice finally erred in points of law and facts thereof that in parts prosecution case was not proved beyond any reasonable doubt. (Sic)

    7. That the sentence imposed was extremely harsh, and excessive since it was applied in mandatory terms as provided by the statute and did not take into consideration the appellant's mitigation and unique facts and circumstances of the offence.

7. Briefly, the background to this appeal is that on December 29, 2014, VCB a girl aged 9 years old and class 4 pupil at a place called Cheronok was at home when Henry (the appellant), came and told her to go to his house. They went to the appellant's house and the appellant told her to remove her underwear, lay on top of her and "did bad manners to her, by using his down part which he uses to urinate which he placed into hers." She then left and told Damaris (PW2) what had transpired but she did not tell her parents as she was scared. It was her further evidence that the appellant had also defiled her on other occasions after the initial incident on December 29, 2014.

8. PW2 was DE a girl aged 14 years. It was her evidence that on December 29, 2014, at about 4PM, she was headed to one Sophia's house when she met PW1 at her gate crying. Upon enquiry, PW1 told her that Lukaya (the appellant), had raped her. She later reported the incident to PW4.

9. PW3 was PC (PW1's mother) It was her evidence that on January 6, 2015, she was at home when PW4 came and told her that PW1 (her daughter), who was aged 9 years at the time having been born on May 24, 2006, had been defiled on December 29, 2014. She then enquired from PW1 who indeed confirmed to her that she had been defiled. She later took her to hospital and recorded a statement.

10. PW4 was LC. It was her evidence that on January 6, 2015, she was at home preparing to go to work when PW2 came and told her that the appellant had defiled PW1 who was a neighbor. She later informed PW3 who was PW1's mother.

11. PW5 was John Koima a clinical officer at Kitale District Hospital. He produced a P3 Form in respect of PW1, who had a history of defilement by a person known to her. Upon examination, PW1's hymen was broken and she had bruises on her labia.

12. PW6 was PC Monica Sisa attached to Cherangany police station and the investigations officer in this case. It was her evidence that on January 10, 2015, she was at the police station when PW1 accompanied by her mother (PW3), reported that PW1 had been defiled by their employee. She produced a copy of the clinic card given to her by PW3 which showed that PW1 was born on May 24, 2006.

13. The appellant in his defence gave a sworn statement and called no witness and denied having committed the offence.

14. When the matter came up for plenary hearing on December 6, 2022, the appellant who appeared in person and while relying on his written submissions urged us to take into account the period that he had stayed in custody considering the fact that he was young at the time of the commission of the offence and that he was not a Kenyan. Ms Kiptoo, learned counsel for the State on the other hand while relying on her written submissions urged us to dismiss the appeal noting that the victim was 8 years old.

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

16. 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 ..."

17. 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)."

18. From a careful perusal of the record, the appellant's written submissions and the oral highlights before us on December 6, 2022, it would appear that the appellant abandoned grounds 2,3,4,5 and 6 in his "amended grounds of appeal" leaving us only with ground 1 and 7 which we shall proceed to address shortly.

19. Indeed, the evidence on record and especially that of PW1 of having been defiled by the appellant who was well known to her and who was their farmhand remained reliable, credible and consistent throughout the trial and was not rebutted even in cross examination. Further, PW1 in her evidence in chief stated she was 9 years old which evidence was corroborated by PW3 (her own mother) who testified that PW1 was 9 years which evidence was further confirmed by a copy of the clinic card produced by PW6 which showed PW1 was born on May 24, 2006.

20. PW2, further gave a detailed account of the events of December 29, 2014, as narrated to her by PW1 which evidence again was not rebutted by the appellant in his defence or in cross examination. The evidence of these two particular witnesses remained firm, credible and reliable even after the appellant sought to have them recalled for further cross examination.

21. The evidence of PW1, PW2, PW3 and PW4 was further corroborated by the P3 Form produced by PW5 which showed that PW1's hymen was broken and that she had bruises on the labia majora.

22. The learned trial magistrate who had the opportunity of seeing the witnesses testify stated as follows in her judgment:

> In my opinion the prosecution proved their case. I will explain how in spite of the content of the defence. First and foremost, I did believe the evidence of the complainant she was coherent and consisted in her evidence and it was not varied in anyway during cross examination. (sic) She remained steadfast. When she was met crying by PW2, (sic), it was soon after the incident and she explained what had happened to her in the exact terms of her evidence herein. She also explained why she did not want to tell her mother. PW2 in her evidence stated that the complainant looked weak and in fact she thought she was unwell. This aspect of the evidence corroborates the evidence of PW1."

23. Nobody could have said it better than the learned trial magistrate who had the opportunity of seeing the witnesses testify.

24. 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 and that there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement and that it was the appellant who defiled PW1 and no one else.

25. Accordingly, we 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.

26. Turning to ground 1 in the appellant's "amended grounds of appeal", the trial magistrate was faulted for failing to appreciate that the appellant was not represented by an advocate nor informed of his right to legal representation at the state's expense pursuant to Article 50 (2) (g) and (h) of the *Constitution*.

27. Article 50 (2) (g) of the *Constitution* provides as follows;

> (2) Every accused person has the right to a fair trial, which includes the right –
>
> g. to choose, and be represented by, an advocate, and to be informed of this right promptly:
>
> h. to have an advocate assigned to the accused person by the State and at State expense if substantial injustice would otherwise result, and to be informed of this right promptly."

28. We have carefully looked at the record and it is indeed true that the appellant was not represented both in the trial court nor in the High Court and there is no evidence on record to show that he requested for legal representation. Indeed, this issue was not even raised before the High Court.

29. This Court in the case of *David Macharia Njoroge v R* (2011) eKLR while considering the provisions Article 50 of the *Constitution* stated as follows:

> State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under the *Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore,

provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where „substantial injustice would otherwise result." persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re- trial where no such legal representation was provided." (Emphasis added).

30. Again this Court in the case of *Isaiah Maroo v Republic* [2015] eKLR while discussing the issue of legal representation stated extensively thus:

> Does the right to legal representation which we have treated (sic) above apply to appeals" We think not. Beginning with the constitutional text itself, it is quite plain that the right to State funded legal representation is available to "every accused person." Indeed, it is one of nearly a score safeguards to a fair trial during which all care must be taken to ensure that the process of adjudicating on whether an accused person is guilty of that which he is charged with is fair, open, transparent, timely, efficient and devoid of prejudice. The entire process presupposes the accused person's innocence until the court should find otherwise on the basis of evidence tendered by the prosecution to the appropriate standard in discharge of a duty peculiarly its own. We do not apprehend that the entire corpus of the elements of a fair trial applies wholesale to an appeal. Once a person has been convicted, on a trial fairly and properly conducted, he no longer enjoys that all-important presumption of innocence. The presumption that sets in is one of legitimacy of his conviction and sentence so long as it was imposed by a court of competent jurisdiction. The fair trial rights enumerated in Article 50 (2) (a) to (p) do not and cannot apply to his situation without leading to an absurdity. In fact, the only application of Article 50 (2) to an appeal is in (q) which provides that an accused person has the right; "if convicted, to appeal to, or apply for review by a higher court as prescribed by law. "It is for precisely this change of status that, for instance, release on bond or bail, which is a right that an arrested person has pending charge or trial and which he enjoys automatically unless compelling reasons dictate otherwise under Article 49 (1) (h), becomes available to a convicted person only under unusual or exceptional circumstances. See, Jivraj Shah– vs Republic [1986] KLR 605; Somo v Republic [1972] EA 476 and Munjia Muchubu v Republic [2014] e KLR.....The considerations that obtain and the position an accused person is placed at in the eyes of the law are totally different after the trial. In the latter case the law is highly solicitous of the position of an accused person, anxious to ensure he receives a fair trial, hence the extra safe guards including State-funded legal representation. In contrast, appeals and other consequential proceedings have a voluntary or elective character at the instance of the appellant. In a jurisdiction where even provision of State-funded legal representation at trial is yet to materialize, it seems to us overly ambitious for the appellant to seek to upset the judgment of the High Court on account of his not having been provided an advocate to represent him in his first appeal." Emphasis added.

31. We reiterate the above position and hold and find that from the circumstances of this case the appellant was not entitled to legal representation as he never raised this issue before the trial court to enable the court consider the same. Again, this issue was not before the High Court for determination and can now not be the subject of this appeal for our determination.

32. It must always be remembered that the right to legal representation by the State is not automatic and from the circumstances of this case, we are not persuaded that substantial injustice was occasioned to the appellant due to lack of legal representation. The appellant ably cross- examined the prosecution

witnesses, and even made an application to recall PW1 and PW2 which request was acceded to by the court and even requested for typed proceedings. The appellant clearly understood the charges he was facing. The evidence in this case against the appellant was so strong and firm in spite of lack of legal representation and we are of the considered opinion that this issue would not have had any significant impact to the appellant's case.

33. In the case of *Mohammed Abudullahi v Republic* [2019] eKLR, this Court stated as follows:

> Having perused the record, it is clear that from the onset up to the conclusion of the trial the appellant was not represented by counsel. There is no evidence of him requesting the court for legal representation. Maybe he did not feel prejudiced by lack of representation. Article 50(1) of the *Constitution* does not in our view make appointment of counsel for an accused person at State expense automatic. If that were so, then such advocates would be appointed even before plea to appear for an accused person regardless of whether an accused person was in need of free legal aid or not. It is imperative for an accused person who feels he needs free legal representation to place such an application before the trial court for consideration. When the matter went to the first appellate Court the appellant did not seek legal counsel either. The learned Judges who heard the first appeal do not appear to have held the view that the appellant needed legal representation. Was the appellant entitled to legal representation at State expense as of right" Was his right to legal representation at the State's expense violated"

34. Consequently, nothing turns on this point and this ground of appeal fails in its entirety.

35. Regarding the 2nd ground of appeal, the appellant has contended that the sentence meted upon him was extremely harsh and excessive, since it was applied in mandatory terms as provided by statute and that the same did not take into consideration his mitigation and the unique facts and circumstances of the offence. The appellant thus urged us to take into account the period that he had spent in custody and the fact that he was young.

36. The appellant herein was handed a minimum of life imprisonment as provided for under Section 8 (2) of the *Sexual Offences Act* No 3 of 2006. The record appears to be incomplete and the appellant's mitigation is missing. Be that as it may, the appellant contended that in mitigation he had sated that; "I am sorry, I will not repeat. I am a student just done my form 4".

37. Taking into consideration the apparent age of the appellant, we deem it fit to reconsider the sentence.

38. Accordingly, we are inclined to exercise our discretion in favour of the appellant and substitute the sentence of life imprisonment meted out on the appellant with a sentence of 30 years' imprisonment to run from the date of sentencing in the trial court that is October 13, 2016.

39. The appellant's appeal only succeeds to that extent. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 31ST DAY OF MARCH, 2023.

F. SICHALE

.....

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