Kipkeu v Republic (Criminal Appeal 86 of 2018)
[2023] KECA 242 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 242 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 86 OF 2018

F SICHALE, FA OCHIENG & WK KORIR, JJA

MARCH 3, 2023

BETWEEN

EDWIN KIBET KIPKEU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret (G.K. Kimondo, J.) delivered and dated 18th August, 2016 IN HC. Criminal Appeal No. 148 of 2013)

JUDGMENT

Addendum

[Rule 37 of the Court of Appeal Rules]

1 On March 3, 2023, this court rendered its judgment in the above appeal. The outcome of the appeal is that we set aside the life sentence and substituted it with a sentence of 20 years' imprisonment. We however did not indicate when the 20 years was to commence.

2 In line with section 333(2) of the *criminal procedure code*, the sentence of 20 years' imprisonment is to run from the date when the appellant was first sentenced by the trial court, that is from July 17, 2013. It is so ordered.

Judgment

1. The appellant herein, Edwin Kibet Kipkeu, was charged and convicted with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on April 12, 2011 Marakwet West District within the then Rift Valley Province, the appellant caused his penis to penetrate the vagina of I.J.Y a girl aged eleven years. Upon being found guilty, the appellant was sentenced to serve life imprisonment. Being aggrieved and dissatisfied with the judgment

of the trial court, the appellant preferred an appeal to the High Court vide Eldoret High Court Criminal Appeal No. 148 of 2013. The High Court in its judgment dated 18th August, 2016 dismissed the appellant's appeal in its entirety.

2. The appellant is now before this court on a second appeal raising four grounds of appeal as follows: First, that the learned Judge erred in upholding the conviction of the appellant based on contradictory evidence of the complainant. Second, that the learned Judge erred in failing to consider the fact that the appellant was not accorded an opportunity to ensure his advocate was present. Third, that the learned Judge erred when he misdirected himself by finding that the complainant was bleeding when he was taken to the hospital yet the clothes were not blood stained. And finally, that the learned Judge erred in upholding the conviction and sentence against the appellant, without observing that there was bad blood between the family of the complainant and the appellant.

3. This being a second appeal, the powers of this court by virtue of section 361(1)(a) and (b) of the *Criminal Procedure Code* is limited to considering matters of law only. The said sections are couched in the following terms:

> "(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—
>
> a. on a matter of fact, and severity of sentence is a matter of fact; or
>
> b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

4. When called upon to expound upon the scope of section 361(1), this Court expressed itself thus in the case of *David Njoroge Macharia v Republic* [2011] eKLR;

> "That being so only matters of law fall for consideration – see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it 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 *Chemagong v. R [1984] KLR 611*."

5. At the hearing, the respondent's case was made up of 7 witnesses. In summary, the evidence of PW1 was that the offence took place at 11:00 p.m on 12th April, 2011 while she was asleep. Her parents (PW3 and PW4) were away and she had locked the door. She did not therefore know how the appellant got entry into the house but that she might have forgotten to secure the latch on the door. She was awakened by pain in her private parts. She reacted immediately, by holding onto the jacket of her assailant, who was in her bed. The assailant identified himself as Edwin Kibet and sought her forgiveness. He promised to bring her some sweets the following day which he did, but she declined to take it. She later reported the matter to her father and mother.

6. The evidence of PW2 was that he examined the complainant three days after the incident. The complainant had a slightly torn hymen which was in the process of healing. He estimated the age of the injury to be 3-4 days. In his opinion, there was evidence of penetration by a blunt object as evidenced by the torn hymen. He produced the P3 form of the complainant. The complainant's father (PW3)

testified that the complainant was born on 15th December 1999 and referred the court to her clinic card (exhibit 2). His evidence was that he was away on 12th April 2011, and had requested the appellant to take care of the complainant and two younger children. Upon his return the next day, the complainant told him that the appellant had entered their house at around 11.00 p.m. the previous night and defiled her. He informed his wife (PW4) who had been away from home at the material time.

7. PW4 testified that when she came back home, the complainant informed her of what had happened. She checked the complainant's clothing. Although the complainant was walking straight up, she complained that she could not sit well. She sought the assistance of the village elder and her neighbours; and they summoned the appellant and members of his family.

   The members of the public wanted to assault the appellant but she persuaded them to leave the matter to the police. She then took the complainant to the hospital.

8. The investigating officer testified as PW5, stating that he visited the scene and saw that the door to the complainant's house was secured by a bent nail. The nail could be adjusted to lock the door from inside. He said it was easy to force the door open. He first saw the complainant when she was taken to the police station by her parents. The complainant told her she felt pain when urinating. He recorded their statements and issued the parents with the P3 form.

9. In his defence, the appellant reiterated his innocence; insisting that the allegations against him were orchestrated by PW3 and his family. He stated that his disagreement with the PW3 started when he was asked by his father to inform PW3 to leave their homestead where they had been accommodated after being driven out of the forest. His evidence was that on the day of the offence, he was sleeping in his house with his kids and he did not commit the offence as alleged.

10. The first appellate court in dismissing the appeal stated at paragraph 29 and 30 as follows:

> " 29. .... But from my analysis and re-evaluation of all the evidence, the charge and all its elements were proved beyond reasonable doubt. I cannot say that the burden of proof was shifted to the appellant at any point. It follows as a corollary that the conviction was safe.
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> 30. Under section 8(2) of the Sexual Offences Act, defilement of a child of eleven years or below attracts imprisonment for life. The sentence is mandatory. The complainant was eleven years five months at the time of the offence. She had not achieved the age of twelve years. The appellant was thus properly sentenced under section 8 (2) of the Act. I am unable to disturb the sentence."

11. This matter was canvassed by way of written submissions. It is the appellant's submission that he was convicted on basis of the evidence of a single witness, PW1, and which evidence was contradictory in itself. The appellant contends that evidence of the complainant being contradictory cannot be relied upon to dispense with his identification as the perpetrator, especially when it is considered that the circumstances of such identification were not favourable.

12. To buttress this line of argument, the appellant placed reliance in the cases of *Kiarie vs Republic* [1984] KLR 739 and *Richard Apela vs Republic*, CA App. No. 45 of 1981.

13. The second issue submitted on by the appellant is that the age of the complainant was not proved to the required standard. Specifically, the appellant submitted that the charge against him could not stand due to uncertainty brought about by the unsettled fact as to the exact age of the complainant. He also submitted that there was a variance in the name of the complainant, thereby watering down the evidence of the prosecution case. The appellant also submitted that the expert medical evidence of

PW2 was not conclusive as to the proof of penetration of the complainant. It was also the appellant's view that there were witnesses mentioned by PW3 who ought to have testified. As the said potential witnesses did not give evidence, the appellant reasoned that that left gaps in the prosecution case. Accordingly, the appellant urged this court to allow the appeal; quash his conviction and set aside the sentence.

14. Lucas Tanui, prosecution counsel, filed submissions on behalf of the respondent. On identification, it was counsel's submission that the appellant was well known to the complainant prior to the offence and that he was identified through his voice. He also pointed out that the appellant offered sweets to the complainant in a bid to silence her. It was counsel's view that these circumstances sufficiently proved that it was the appellant who committed the offence.

15. On the alleged contradictory evidence, counsel submitted that the evidence of the complainant was sufficient to convict the appellant; but even so, the same was corroborated by other witnesses. On the alleged failure to call crucial witnesses, counsel submitted that the said witnesses were not eye witnesses and that since the prosecution did not seek to adduce the evidence of confession by the appellant, those witnesses were not key to the case against the appellant. In summary, counsel urged the court to dismiss the appeal and uphold the findings of the courts below.

16. As we have already stated earlier in this judgment, our mandate in this appeal is limited under section 361(1)(a) and (b) of the *Criminal Procedure Code,* to considering matters of law only.

17. First, we will give consideration as to whether or not the learned Judge of the first appellate court misdirected himself or misapplied the law and principles in light of the evidence on record. And second, whether the evidence tendered against the appellant was marred with contradictions and discrepancies that went to the root of the case, thereby vitiating the conviction against the appellant.

18. We start by addressing the question whether the learned Judge rightly applied the law and principles to the evidence on record in affirming the findings of the trial court. The appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. The elements of this offence include, proof of penetration; proof as to the identity of the appellant as the perpetrator of the acts; and finally, the age of the complainant. Even as we consider these elements, we pay heed to the need for this Court to take caution, as was held in the case;

Stephen M'riungi & 3 Others vs. Republic [1983] eKLR;

> " ...that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law. We, here, have resisted the temptation."

19. In addressing the issue of proof of penetration, the first appellate court in its judgment held as follows;

> " But in this case the penetration was corroborated by Dr. Kimosop (PW2); and, the P3 form (exhibit 2). There were no bruises on the labia majora and minora; but the hymen had a slight tear and in the process of healing. In his opinion, there was evidence of penetration by a blunt object evidenced by the torn hymen. I am alive that the complainant was taken to hospital three days later on 16th April 2011; and, had already taken a bath. The appellant tried to make capital of the absence of bruises on the vulva. But what is critical is whether

there was partial or full penetration. In this case there was ample primary evidence proving penetration. Section 2 of the Act defines penetration as follows-

> 'Penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person"'.

20. We have gone through the record of appeal and we find that the findings of the first appellate court in this regard is in tandem with the evidence on record from PW1, PW2 and Pexhb. 2. The appellant's grievance against the first appellate court's findings is that there could not have been penetration where there were no bruises observed in the labias. We reiterate this court's view in *Mark Oiruri Mose vs. Republic* [2013] eKLR that:

> " So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ...
>
> ... In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

21. Adopting the reasoning of this court in the *Mark Ouiruri* case above, we are convinced that even in the absence of the bruises, penetration of the complainant was proved by the evidence of PW1, which was corroborated by the fact that the complainant's hymen was partially torn. We therefore find that the two courts below addressed themselves appropriately to this evidence.

22. The next question is with regard to the identity of the person who committed the offence. The evidence surrounding the identity of the appellant was that of PW1 who testified that the assailant identified himself as Edwin Kibet and sought her forgiveness. The assailant then promised to bring her some sweets the following day which he did; but she declined to take it. She also testified that she recognized the appellant through his voice and also when she heard the appellant as he was walking back to his house. The first appellate court in its judgment addressed this issue in paragraph 17 to 22. The most specific aspect of that judgment reads as follows:

> " The appellant was thus living in the same homestead with the complainant. The appellant confirmed it in his evidence. The offence took place at night. There was no light. The complainant was asleep. She only reacted to searing pain in her private parts. She woke up and held onto the jacket of her assailant. The assailant identified himself as Edwin Kibet and sought her forgiveness. The complainant testified that "he really disturbed [her] until [she] told him [she] will not report him". She then heard him get into his house. She said she recognized him by his voice. She said she knew his voice."

23. This Court has addressed the issue of voice recognition many times before.

The learned Judge also made reference to the various decisions of this court and of the High Court in reaching the conclusion that the identity of the appellant was sufficiently proved. In *Mbelle vs. Republic* [1984] KLR 626, this court set out the considerations that a court must take into account when considering whether or not to admit the evidence of voice identification at page 632 thus:

> " In relation to the identification by voice, care would obviously be necessary to ensure that (a) that it was the accused person's voice, (b) that the witness was familiar with it, and (c)

that the conditions obtaining at the time it was made were such that there was no mistake in testifying to what [sic] was said and who said it."

24. Similarly, in *Choge vs. R* [1985] KLR 1, this Court when faced with the issue of voice identification pronounced itself as follows:

> " There can be no doubt that evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances, carry as much weight as visual identification, since it would be identification by recognition rather than at first sight. In *Rosemary Njeri v Republi*c [1977] Crim App 27, a victim of the offence of grievous harm testified she heard the appellant say 'break her legs'. The reception of this evidence was upheld in the High Court on the first appeal and also on the second appeal, in which this court said:
>
> > 'Mr Otieno has submitted that identification by voice is less satisfactory than visual identification. In our view it can be equally safe and free from error, more so if the identification takes place at night. We agree with the two lower courts that in the particular circumstances of this case, the appellant and the complainant being familiar with each other for many years, the possibility of error was excluded."'

25. From the two authorities we have cited above, it is without doubt a fact that identification by voice can be equated to recognition. However, for such evidence to achieve the threshold of recognition, it ought to pass a three tier test, namely, first, that the complainant was familiar with the voice of the accused or appellant, second, that the voice was of the appellant, and third, that the conditions in place favoured safe identification of the appellant's voice by the complainant.

26. Was the complainant well conversant with the appellant prior to the incident? The answer to this question is an emphatic yes. The evidence from both the prosecution and the defence was that the appellant and the complainant were neighbours. Was the voice that of the appellant? In answering this question, we must seek to assess whether the evidence on record revealed the words alleged to have been spoken by the appellant and whether it was the appellant who spoke the words. In paying homage to the evidence of PW1, we find that the complainant and the appellant had a long discussion. PW1 testified that when he held the appellant's jacket, the appellant told her that he was Kibet. The appellant further asked her to forgive him and then promised to bring her sweets, which he indeed brought the following day.

27. In the circumstances, even though there is no record of the exact words of the appellant, we find that the complainant and the appellant held a lengthy conversation. During the said conversation the complainant positively recognised the appellant. We are convinced without any iota of doubt that indeed the conditions were such that it enabled the complainant to recognise the appellant's voice. We therefore find no fault on the learned Judge's application of the principles of voice identification to the evidence, thereby reaching a conclusion that the appellant was indeed the perpetrator of the offence.

28. The last bit is whether the age of the complainant was proved. From the record, we note that the charge sheet was amended to make the complainant's age read 11 years. The complainant's medical card showed that the complainant was born on December 15, 1999 and was therefore about eleven years and five months at the time of the offence. This is also the finding reached by the two courts below. Section 8(2) of the *Sexual Offences Act* makes reference to complainants who were 11 years or less. As the complainant was over 11 years, she did not fit into that category. Pursuant to Section 8(3), the complainant should be a child between the age of 12 and 15 years.

29. The next issue we address is whether the evidenced tendered against the appellant were marred with contradictions and discrepancies that went deep to the root of the case thereby capable of vitiating the conviction against the appellant. The learned Judge in his judgment addressed this issue at paragraph 27 and 28 and concluded thus:

> "I find that the discrepancies were minor and did not prejudice the appellant. They are also curable under section 382 of the *Criminal Procedure Code*"

30. The same complaints that the appellant raised before the first appellate court concerning contradictions are the same ones he raised before us. The appellant takes issue with the name of the complainant, the age of the complainant and the dates in the Pexhb. 2 and the dates given by PW2. In our view, we do not find any reason that would warrant our deviation from the conclusion of the learned Judge. Such contradictions are trivial and do not in any way vitiate the evidentiary weight of the evidence tendered to prove the elements of the offence herein.

31. The upshot is that given our analysis and the reasons we have set forth, we find no basis whatsoever to warrant our interference with the findings of the first appellate court on the issue of conviction.

32. As regards the sentence, Section 8(3) of the *Sexual Offences Act* prescribes that if the complainant is over the age of 11 years, the offender shall be liable to a sentence of not less than 20 years imprisonment. The appellant was requested by the complainant's father, to take care of the complainant and 2 younger children, because the father of the children was going to be away on the material day. Instead of taking care of the children, the appellant became the predator. In our considered opinion, the actions of the appellant call for a deterrent sentence, as he abused the trust bestowed on him.

33. In the result, we set aside the life sentence, and we substitute it with a sentence of imprisonment for 20 years.

DATED AND DELIVERED AT NAKURU THIS 3RD DAY OF MARCH, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. Korir

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR