Rop v Republic (Criminal Appeal 227 of 2015)
[2023] KECA 511 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 511 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 227 OF 2015

F SICHALE, FA OCHIENG & LA ACHODE, JJA

MAY 12, 2023

BETWEEN

PETER CHERUIYOT ROP ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Nakuru, (Emukule, J) dated 10th October 2014 IN HC. CRA NO. 255 OF 2010)

JUDGMENT

1. Peter Cheruiyot Rop (the appellant herein), has preferred this second appeal against the judgment of Emukule J dated October 10, 2014, in which he had initially been charged at the Chief Magistrate's Court in Nakuru with the main offence of committing an unnatural offence contrary to section 162 (a), of the *Penal Code* cap 63 of the Laws of Kenya.

2. The particulars of the offence were that on February 7, 2009, at (particulars withheld), he had carnal knowledge of BK against the order of nature.

3. The appellant further faced three different counts of committing indecent acts contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that between the months of August 2008 to January 2009, at (particulars withheld), he indecently assaulted DK, CK and KK by touching their private parts namely, anus and penis.

4. The appellant denied the charges after which a trial ensued. In a judgment delivered on August 12, 2010, H.O Barasa (the then Resident Magistrate at Nakuru), convicted him of the main charge and sentenced him to 21 years' 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 October 10, 2014, Emukule 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 vide a Notice of Appeal dated October 23, 2014, raising 4 grounds of appeal. Subsequently thereafter, the appellant filed undated *"amended memorandum grounds of appeal"* raising 18 grounds of appeal which we shall advert to shortly.

7. Briefly, the background to this appeal is as follows: PW1 was BK, an 8- year-old boy at [particulars withheld (all the boys including PW2, PW3 and PW4 were students at the same school). It was his evidence that on a day he could not recall, he was at home when the appellant called him to Gilbert's house, locked the door, put him on the bed, removed his trouser and "did bad manners to him." The appellant then gave him glucose and told him not to tell anyone. He later told his mother what had transpired and was later taken to the hospital and given drugs.

8. PW2 was DK a 9-year-old boy. It was his evidence that he knew the appellant as he used to work for them as a farmhand and that there was a time that he called him to his house and asked him to sleep with him. He further testified that the appellant had removed his trouser but he told him that he would report him to his parents and he jumped out of the bed. PW2 reported the incident to his brother.

9. PW3 was CK an 11-year-old boy. It was his evidence that on a day he could not recall, the appellant who used to work in Andrew Koech's house had taken him to his house, put him on his bed and tried to remove his trouser but he pushed him and ran away and reported the incident to his father. He further testified that one another occasion, he was going to the shop when he heard screams coming from the appellant's house and when he peeped through the window, he saw PW1 and the appellant on the bed and the appellant was doing bad manners to PW1. The appellant was on top of PW1 whilst lying on his stomach.

10. PW4 was KK a 12-year-old boy. It was his evidence that he knew the appellant who used to work at PW2's home. It was his evidence that on a day he could not recall, he was playing with PW2 and PW3 when the appellant came and held him and started kissing him on both cheeks, took him to his house removed his trouser and attempted to make love to him. He managed to push him away and ran outside and later reported the incident to his father.

11. PW5, AKAK was PW1's father and acting on information from his wife which he received on 7th February, 2009, he enquired from PW1 what had happened to him. PW1 confirmed to him that indeed the appellant had sodomized him. He further told him that the appellant had sodomized PW2, PW3 and PW4. He later reported the matter to Keringet police post and was referred to Molo police station where he recorded his statement.

12. PW6 was PC Leah Chesang attached to Molo police station. On 11th February 2009, she was in the office when PW1, PW2 and PW3 came to the police station with their parents and reported that the appellant had defiled them on different dates. She took the children to hospital for examination and the doctor confirmed that PW1 had actually been injured in the anus. She later charged the appellant with the current offence.

13. PW7 was Macharia Mwangi a clinical officer at Molo district hospital. He produced a P3 Form in respect of PW1, who had alleged that he had been sodomized by someone known to him. On examining his private parts, there were superficial tears in the anal region.

14. The appellant in his defence gave an unsworn statement and called no witness and denied committing the offence. He further testified that he was framed up by PW2's father whom he used to work for

because he owed him Kshs 20,000.00 in wages. Further, that PW5 had a grudge against him as he had refused to work for him.

15. When the matter came up for plenary hearing on 31st January 2023, both parties opted not to highlight their submissions and intimated to Court that they would be relying on their written submissions. On our part, we have considered the record, the rival 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 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 ..."

17. 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)."

18. Having considered the appellant's submissions *viz-a viz* his "amended memorandum grounds of appeal" some of which are overlapping, the following issues arise for our determination;

    1. Whether the two courts below erred in in failing to find that the prosecution's case was not proved beyond reasonable doubt.

    2. Whether the appellant's right to a fair trial under Article 50 (2) of the *Constitution* were violated.

    3. Whether the trial court erred in convicting the appellant on a defective charge sheet.

    4. Whether trial court erred in failing to consider the provisions of Section 333 (2) of the *Criminal Procedure Code*.

19. Regarding the first ground of appeal, it was submitted by the appellant that PW1 could not remember the date of the alleged offence and that the evidence of PW1, PW2, PW3 and PW4 indicated no penetration at all and that further the medical evidence on record did not support the charge.

20. On the other hand, it was submitted for the respondent that the prosecution discharged its burden of proof to the required standard and that it was on this basis that the appellant was convicted. Consequently, we were urged to dismiss the appeal.

21. PW1 who was the complainant in this case testified that he was at home on a day he could not recall when the appellant called him to Gilbert's house, locked the house, put him on the bed, removed his trouser and *"did bad manners"* to him. It was his further evidence that the appellant gave him glucose and told him not to tell anyone and that he felt pain *(witness touched his buttocks).*

22. The evidence of this witness remained firm and consistent in cross examination and the appellant did not even cross examine him on the same.

23. PW1's evidence that he had been sodomized was corroborated by the medical evidence of the clinical officer, PW7 Macharia Mwangi who testified that upon examining PW1, there was superficial tear on the anal region. Again, the evidence of this witness remained firm and consistent throughout the trial.

24. PW3 on the other hand testified that there was a time he was going to the shop when he heard screams coming from the appellant's house. He peeped through the window and saw the appellant and PW1 on the bed and that the appellant *"was doing bad manners"* to PW1. PW3 gave a vivid graphic description of what he saw when he testified *inter alia* thus:

> "Peter was lying on his stomach. B was also lying down. Peter was on top of B. I don't know why B was screaming."

In cross examination he reiterated ;

> "I saw you with my own eyes. I am telling the court the truth."

25. It is common knowledge that there are normally no eye witnesses in offences of this nature. In the instant case however, PW3 witnessed the incident and his evidence towards this respect remained uncontroverted. As stated earlier, PW1's evidence that he had been sodomized by the appellant was further corroborated by the evidence of PW7 the clinical officer. The identity of the appellant was not in question as he was well known to PW1, PW2, PW3, PW4 and PW5 and he confirmed as such during his testimony and even stated where PW1-PW4 all schooled.

26. It was the appellant's further contention that the age of the complainant was not established as he was neither taken for age assessment and neither was a birth certificate produced.

27. PW1 in his evidence in chief stated that he was 8 years old, a fact that was not in dispute. In any event proof of age of the complainant in this case was immaterial. Section 162 (a) of the *Penal Code* cap 63 of the Laws of Kenya, pursuant to which the appellant was charged with provides:

Any person who—

a. has carnal knowledge of any person against the order of nature; or

(b) .....

(c) .....

is guilty of a felony and is liable to imprisonment for fourteen years:

Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—

i. the offence was committed without the consent of the person who was carnally known; or

ii. the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act". (Emphasis supplied).

28. Consequently, nothing turns on this point. The mere fact that PW1 could not remember the date when the offence was committed did not vitiate the prosecution's case and was not fatal. The evidence in this case was clear, firm, overwhelming and straight forward. We think we have said enough to demonstrate why this ground of appeal is devoid of any merit. It is hereby dismissed in its entirety.

29. The High Court was further faulted for failing to note that the appellant's rights to a fair trial under Article 50 (2) of the *Constitution* were violated in that he was not given all the witness statements. We have carefully perused the record and we note that the appellant did not raise this issue in the trial court nor in the High Court. Be that as it may, the record shows that when the appellant was first arraigned in court 13th February 2009, the charges were read over to him in Kiswahili a language which it is indicated he understood, whereupon he entered a plea of not guilty in all the 4 counts. There is no indication whatsoever that he requested for witness statements and this contention therefore in not supported by any evidence.

30. The appellant thereafter actively participated in the proceedings and ably cross examined PW1-PW5 until 3rd August 2009, when Mr. Motanya sought to come on record for him and subsequently requested for witness statements. On 7th September 2009, Mr. Motanya sought recall of PW1 and PW3 for further cross examination which request was acceded to by the court.

31. From the circumstances of this case it is evident that the appellant clearly understood the charges he was facing and at the tail end of the trial he was even represented by counsel who sought the recall of PW1 and PW3. The contention that he was not supplied with witness statements was clearly an afterthought. Consequently, this ground of appeal fails.

32. Turning to the third ground of appeal, the High Court was faulted for failing to note that the appellant was convicted on a defective charge sheet. Save for quoting several Sections of the *Sexual Offences Act*, the appellant has not stated how the charge sheet was defective.

33. In *Peter Ngure Mwangi v Republic* [2014] eKLR this Court while addressing the issue of a defective charge stated as follows;

> "On the issue of a defective charge sheet, there are two limbs to it. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not. This Court considered the ingredients necessary in a charge sheet and stated as follows in the case of *Isaac Omambia V Republic* , [1995] eKLR:
>
> "In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

34. A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from *Archbold, Criminal Pleading, Evidence and Practice* (40th Edn), page 52 paragraph 53, this Court stated in *Yongo v R*, (1983) eKLR that: "In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

i. When it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,

(ii) When for such reason it does not accord with the evidence given at the trial."

35. Further guidance is found in the case of *Peter Sabem Leitu v R*, CR. A No.482 Of 2007 (UR) where this Court held thus :

> "The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial" We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant." (Emphasis ours).

36. In the instant case, the charge sheet was clearly read out to the appellant in a language that he understood and he clearly understood the charges he was facing and he ably conducted his case with ease until 3rd August 2009, when Mr. Motanya came on record for him. Save for making general vague allegations that the charge sheet was defective, no evidence was tendered to support this contention. Consequently, nothing turns on this point.

37. Finally, the appellant contended that the provisions of Section 333 (2) of the *Criminal Procedure Code* were not considered and that he had spent about 2 years and 8 months in custody. That Section provides as follows:

> 333. Warrant in case of sentence of imprisonment ...
>
> (1) ...
>
> (2) Subject to the provisions of section 38 of the *Penal Code* (Cap. 63), every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

38. Firstly, we note that the appellant did not raise this issue before the High Court and the same therefore cannot be the subject of our determination in this appeal. Secondly we are not seized of the original record and the contention by the appellant that he spent 2 years and 8 months in custody remains his words. Additionally, the trial court did not say that the sentence was to run from the date of conviction. Consequently, 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 committing an unnatural offence against the appellant beyond any reasonable doubt and that it is the appellant and no one else, who had carnal knowledge of PW1 against the order of nature.

40. Accordingly, the appellant's conviction was safe and sound, which conviction we hereby affirm and confirm and consequently dismiss the appellant's appeal on conviction.

41. Finally, on sentencing the appellant was sentenced to 21 years' imprisonment which is the maximum penalty provided for under Section 162 (a) of the *Penal Code* where there is no consent or where the consent is obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

42. In the instant case, the appellant sodomized an eight-year-old boy and obviously there was no consent to the act. The appellant was not even remorseful for his actions as his advocate intimated to court that he had no mitigation to make. The appellant was also charged with three other counts of committing indecent acts with minors though he was acquitted of those counts. The evidence on record depicts the appellant as a pedophile and in our view, we consider the circumstances under which the offence was committed to be aggravated and as such the appellant does not deserve any mercy. We are therefore not inclined to disturb the sentence.

43. The upshot of the foregoing is that the appellant's appeal is without merit and the same is hereby dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF MAY, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR