JLL v Republic (Criminal Appeal 107 of 2019)
[2023] KECA 968 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 968 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 107 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

JULY 28, 2023

BETWEEN

JLL ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the judgment of the High Court at Eldoret (L. Kimaru, J) In HCCRA. No. 76 of 2017)

JUDGMENT

1. JLL the appellant, is attempting for the second time, to upset the conviction and sentence imposed upon him in the Chief magistrate's court at Eldoret, for the offence of defilement contrary to section 8(1) and 8(2) of the *Sexual Offences Act* SOA. He had faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the SOA at the same place and time.

2. The particulars of the main charge were that on the July 6, 2016 at [Particulars Withheld] Eldoret, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of PM, a girl aged 8 years.

3. The appellant denied the charges, precipitating the trial in which the prosecution presented four witnesses to prove its case. At the close of the prosecution case, the appellant was placed on his defence, whereupon he gave a sworn statement, and did not call any witnesses.

4. To put the appeal into context, we have set out a summary of the case that was before the trial court. The case for the prosecution was that the appellant was not the biological father of the 8years old PM (PW1), but was cohabiting with her mother, SK (PW2) and relating with the girl as her step-father.

5. On the material day the appellant called the minor into the bedroom to get his socks for him and when she came in, he threw her onto the bed and warned her not to scream. He then bound her with a rag,

gagged her, undressed her, and proceeded to defile her. When he was finished, he sent her to go out and buy paraffin for him. On her way to the shop, she met her mother, PW2 and told her what had transpired.

6. PW2 took the minor to hospital and thereafter to Eldoret police station to make a report. PC Nyongesa, (PW3) received the report and PW1's stained clothes and issued them with a P3 form.

7. Dr Yatich, examined PW1 and filled the P3 form on her behalf at the Moi Teaching and Referral Hospital. She however left the hospital before the case was heard. Her colleague Dr Tenet (PW4), testified on her behalf and produced the P3 form dated July 7, 2016 in evidence. The P3 form indicated that upon examination, PW1 was observed to have a fresh torn hymen with redness of the labia which led to the conclusion that she had been defiled.

8. In his defence the appellant confirmed that he was residing with PW2, and was a foster father to PW1. His testimony was that he and PW2 became estranged because of her drinking habit and her dishonesty for not disclosing that she had two other children apart from PW1. That PW2 gave him an ultimatum to reconcile with her, or pay her Kshs 50,000/-. He failed to comply and was arrested on September 30, 2016, from his home and detained overnight. He added that PW2 had another man also jailed, on similar allegations.

9. Upon consideration of the evidence at the end of the trial, Hon Obulutsa CM found that the prosecution had proved the charge of defilement against the appellant beyond reasonable doubt. He convicted the appellant accordingly, and after considering his mitigation, sentenced him to life imprisonment as provided by law.

10. The appellant appealed to the High Court at Eldoret. Kimaru J (as he then was), considered the evidence and dismissed the appeal which he found to have no merit. He upheld the conviction and sentence of the trial court, provoking the instant appeal.

11. The grounds of the instant appeal are that: the learned Judge upheld the conviction against the appellant on circumstantial evidence and failed to apply the principles applicable; the crucial evidence relied on was obtained through coercion from the complainant and the charges were amended yet the prosecution witnesses were not recalled as provided for in section 214 of the CPC; the evidence of the actual time of commission of the offence was flawed; the medical evidence was not conclusive and did not prove the element of penetration as required by law; the conviction was based on the evidence of witnesses who were not called to testify; the appellant's defence which was plausible and unrebutted by the prosecution was not considered by the court and lastly, that the minimum mandatory sentence imposed upon him denied the court the discretion to judge according to the circumstances of the case.

12. This appeal was canvased by way of written submissions that were orally highlighted during the plenary virtual hearing. The appellant who was in person filed undated written submissions. The Prosecuting Counsel, Ms Judith Ayuma filed written submission dated February 9, 2023 on behalf of the respondent. Prosecuting counsel Mr Mugun appeared for the respondent during plenary.

13. In his submissions the appellant argued that there was no direct evidence to link him to the offence, since nobody witnessed the offence being committed. That the circumstances surrounding the alleged commission by the appellant cannot 'meet the test in the cases of *Rex vs Kipkering and Another (1949) EACA* and *Dhalay vs Republic (1995-1998) EA*'. He urged that the evidence against him was not conclusive and the conviction against him was therefore, unsafe, prejudicial and amounted to a miscarriage of justice.

14. He submitted that a copy of the amended charge sheet was not given to him to read and understand what the charge and the particulars included and this was in breach of Section 214 of the CPC. Also,

that the appellant was not informed of the need to amend the charge sheet prior to amending it. He was only told after the charge sheet was amended and the charges were read to him the second time.

15. The appellant argued that the lapse of a period of three months from the time the report was made to the police on the July 6, 2016, and the arrest on the September 30, 2016, was not explained yet he was still residing with PW2.

16. The appellant contended that the evidence of PW4 was a mere opinion and should not have been relied upon to convict him. Further, that the tear of the hymen is not conclusive proof of penetration. He added that PW1 was not being a truthful witness.

17. The appellant urged that some of the prosecution witnesses who were crucial to the case were not called to testify. He gave the example of a shopkeeper, whom PW1 allegedly told that she was defiled by the appellant, and the neighbours who were allegedly present at the time of the commission of the offence.

18. The appellant submitted that his defence was not considered by the court, yet it cast doubt on the prosecution case. Further, that the mandatory sentence imposed upon him did not give the court an opportunity to consider the peculiar circumstances of his case and was therefore unconstitutional and should be set aside.

19. In rebuttal, the State submitted that the evidence relied on by the prosecution was direct and not circumstantial since the victim and the mother testified. That the victim identified the appellant and clearly stated what had happened.

20. The State contended that section 214 of the Criminal Procedure Code was not contravened. That the charge sheet as amended on December 20, 2016 was read to the appellant before the trial began.

21. The State urged that the element of penetration was adequately proved. This was by the testimony of the victim who stated that she was defiled by the appellant, and the doctor who indicated in the P3 form, that there was fresh hymenal tear at position 9 O'clock, erythematous labia minora and whitish discharge on the victim.

22. On the witnesses that were not called, the State relied on this Court's decision in *Joseph Kiptum Keter vs R (2007) eKLR*, where the cited case of *Bukenya vs Uganda (1972) EA 549* held that:

> ' The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt'.

It was submitted that the evidence adduced by the complainant and her mother was cogent, credible and consistent and further that there is no legal requirement for the prosecution to call a particular number of witnesses.

23. On the allegations that the appellant's defence was not considered, the State submitted that his testimony that there existed a grudge between him and the victim's mother, was rebutted by the complainant's mother, who stated that they had not differed and that they were still living together in the same house. That the defence was considered by both the trial court and the superior Court and found to be baseless and was dismissed as an attempt by the appellant to exonerate himself from the crime he had committed.

24. Lastly on sentence, the State urged that both courts considered the circumstances of the case and meted out the sentence of life imprisonment against the appellant, which sentence was lawful.

25. We have considered the record of appeal, the rival arguments and the law. Our duty as the second appeal Court is limited to consideration of matters of law only. In this respect, section 361 of the *Criminal Procedure Code* provides that –

> ' 361.
>
> (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 –
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> 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.'

26. Also, this Court in *Karingo v Republic (1982) KLR 213* held as follows:

> ' A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless they are based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karori S/O Karanja versus Republic (1956 17 EALA 146).'

27. Having considered the record, the issues that fall for our determination are as follows:

a. Whether section 214 of the Criminal Procedure Code was contravened,

b. Whether the evidence presented was direct or circumstantial,

c. Whether the prosecution left out crucial witnesses,

d. Whether all the elements of defilement were proved beyond reasonable doubt,

e. Whether the appellant's defence was considered, and

f. Whether the sentence meted upon the appellant is constitutional.

28. The first and second issues were not dealt with in the first appeal. They were raised in the second appeal for the first time. Nevertheless, we considered them since they are matters of law.

29. On the first issue the appellant argued that section 214 of the Criminal Procedure Code was contravened, while the respondent contended that the said section was not contravened as the charge sheet was amended before the trial began. The said section stipulates as follows;

> ' (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

i. Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

ii. Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross- examination.

2. Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

3. Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

30. The record indicates that the charge sheet was amended on December 20, 2016. The amended charge was read to the appellant and he pleaded to it. This was before the trial began. We agree with the respondent that the section 214 of the Criminal Procedure Code was not contravened in any way and this ground therefore fails.

31. On the second issue, the appellant argued that the prosecution presented circumstantial evidence, which the two courts below did not subject to the rules applicable as set out in case law, for it to lead to a conviction. On the other hand, the respondent contended that the prosecution tendered direct evidence from the complainant herself and other witnesses who testified in court. The record indicates that the star witness was the victim against whose person the offence was committed. The prosecution evidence cannot therefore be termed as circumstantial and this ground too must fail.

32. The appellant's next ground was that the prosecution did not call crucial witnesses in the case, such as the shopkeeper whom the complainant allegedly informed about the defilement, and their neighbours who were allegedly in their houses near the scene when the alleged ordeal occurred. His argument was that the evidence of such witnesses would have been adverse to the prosecution case. In rebuttal, the state contended that the law does not require the prosecution to provide a specific number of witnesses. That what is required from them is to provide witness(es) who would prove their case beyond reasonable doubt. It was asserted that the witnesses that were presented for this case served that purpose.

33. On this issue we are guided by the decision in Bukenya v Uganda [1972] EA 549y, where the court addressed the question as to which, or how many witnesses to call, and rendered itself thus:

> ' It is well established that the Director has discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the

case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse, to the prosecution case.'

34. We have looked at the evidence of the two brackets of witnesses mentioned by the appellant. Nowhere in the record did the complainant state that she confided in a shopkeeper about the ordeal she suffered. The shopkeeper is mentioned in passing during cross examination where she stated: 'I go to the shops usually where I tell the shopkeeper'. It is not clear what that statement was in reference to. In respect to the neighbours, PW1 clearly stated that she did not tell them what had transpired. We have considered the record as a whole and we cannot state with any certainty, that there were material witnesses who were excluded by the prosecution, or that there is a basis for us to draw an inference that their evidence would have been adverse to the prosecution case.

35. The appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the SOA. Section 8 (1) of the SOA provides that:

> ' A person who commits an act which causes penetration with a child is guilty of an offence termed defilement'

36. This Court laid down the elements that constitute the offence of defilement in the case of *John Mutua Munyoki v Republic (2017) eKLR* as follows:

> ' For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:
>
> I. The victim must be a minor
>
> II. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice.'

37. The age of the victim was stated to be eight years at the time of the offence. According to PW2 her mother, PW1 was born on March 3, 2008 and this offence occurred on July 6, 2016. Since the age of the victim was not disputed and was not a subject of this appeal, we did not delve in to it further.

38. On to penetration, the appellant urged that it was not proved to the required standard, while the State contended that it was. The superior court was of the view that the prosecution had indeed, established to the required standard of proof, that the complainant had been penetrated.

39. The evidence of PW1 on record is as follows:

> ' I remember in July (witness broke down in tears) 1 was at home when the accused told me to look for his socks in the bedroom. The accused threw me on the bed. He told me not to scream. He tied me with a rag, gaffed (sic) me, he undressed me. He removed my clothes and defiled me'

40. The evidence of PW1 was corroborated by that of the doctor. From the P3 form, it is clear that the doctor examined the complainant on July 7, 2016, a day after the assault. His observations were that PW1 had fresh hymenal tear at position 9 O'clock, erythematous labia minora and a whitish discharge. In our considered view, these findings lead to no other conclusion in the circumstances of this case,

other than that the victim was penetrated. We are therefore, satisfied that this element was proved to the required standard.

41. On identification, it was not in dispute that the appellant was a step father to the victim. Identification was therefore, by recognition. On how to assess the evidence of identification by recognition, we were guided by this Court's decision in *Rotich Kipsongo v Republic [2008] eKLR*, where the Court said:

> ' This Court had occasion to deal with the issue of identification by recognition in several cases, one of them being Kenga Chea Thoya vs Republic Criminal Appeal No 375 of 2006 (Unreported) where it said,
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> > 'On our own re-evaluation of the evidence, we find this to be a straight forward case in which the appellant was recognized by the witness (PW 1) who knew him. This was clearly a case of recognition rather than identification and as it has been observed severally by this Court, recognition is more satisfactory more assuring and more reliable than identification of a stranger – see Anjononi v Republic [1980] KLR 59.'

42. The offence occurred in broad day light and was perpetrated by a person well known to the victim. She was not ambushed by a person she could not see. On the contrary the appellant called her into the house where he was, on the pretext of asking her to find his socks for him before he pounced on her. We therefore find that the appellant was properly identified as the perpetrator of the offence against the complainant.

43. The appellant's other ground was that his defence was not considered. The State urged that the appellant's defence was considered, and found it to be baseless. The High Court in its judgment stated as follows concerning the appellant's defence:

> ' On re-evaluation of this evidence, it was clear to this court that the appellant's defence was just but a way of attempting to exonerate himself from a crime that he had committed. If the appellant was to be believed, then, it meant that PW2 caused her daughter to be defiled by someone and then framed the appellant. Such a possibility can only be a product of a diabolic mind. No sane mother would put her child in harm's way just to settle a score with an erstwhile lover. The evidence adduced by the complainant and her mother was cogent, credible and consistent. The evidence corroborated each other in all material respects'

It is therefore crystal clear from the excerpt above, that the appellant's defence was taken into consideration and found to be unbelievable, in light of all the other evidence on record and this ground cannot stand.

44. Now we turn to the sentence. The appellant was sentenced by dint of Section 8 (2) of the Sexual Offence Act which provides that:

> ' A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life'

45. The appellant contended that the mandatory nature of the sentence did not give the court an opportunity to exercise its discretion, especially after his mitigation. The state on its part contended that the sentence imposed on the appellant is lawful as provided by the law.

46. The superior court had this to say while dealing with sentence: 'As regard sentence, the sentence imposed by the trial court is legal. It is provided under section 8 (2) of the *Sexual Offences Act*. This court cannot interfere with the sentence.'

47. We are guided by this Court decision in *Joshua Gichuki Mwangi vs Republic; Criminal Appeal No 84 of 2015* where this Court grappled with the mandatory nature of life sentence meted on the sexual offence offenders and observed as follows:

> ' We emphasise that this Court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the SOA due to the heinous nature of the crimes committed. And they will continue to be appropriately punished as was pronounced in Athanus Lijodi vs Republic [2021] eKLR;
>
> > 'On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (Supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences, (see for instance Evans Wanjala Wanyonyi v Republic (2019) eKLR.) Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited'

48. We therefore, considered the circumstances of this case to establish whether, upon proper exercise of sentencing discretion and consideration of the facts of this case, the sentence prescribed by the *Sexual Offences Act* is deserved or merited. The appellant violated a child of the tender age of eight years, who was under his protection and care and who considered him to be her father. He destroyed her dignity and her trust for his momentary gratification and that is a trauma she will have to live with for the rest of her life. We are therefore of the considered view that the sentence meted upon the appellant was commensurate with the act.

49. Ultimately, after a careful analysis of all the grounds of appeal and a re-evaluation of the entire record, we are satisfied that this appeal is for dismissal as it lacks merit. The appeal is therefore, dismissed in its entirety.

DATED AND DELIVERED IN ELDORET THIS 28TH DAY OF JULY 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