Limo v Republic (Criminal Appeal 69 of 2018)
[2022] KECA 709 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 709 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 69 OF 2018

PO KIAGE, A MBOGHOLI-MSAGHA & F TUIYOTT, JJA

APRIL 28, 2022

BETWEEN

WILLIAM KIPTOO LIMO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the original conviction and sentence in Criminal Case Number 3636 of 2010 in the Principal Magistrate's Court at Kapsabet (B. Mosiria, PM))

JUDGMENT

[1] William Kiptoo Limo, the appellant is serving a sentence of 20 years imprisonment having been convicted by Hon. B. Mosina Principal Magistrate for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. His first appeal to the High Court at Eldoret was not successful. Undeterred, he is now before us.

[2] Although MJ told court that she was born on the 1st January 1997, the notification of her birth reads 3rd January 1997. In the matter at hand, nothing turns on this inconsistency because, whichever way, the girl would be 13 years and nine months on 18th September 2010. This date is important in these proceedings. The prosecution case is that on this day MJ was at her home in Itigo at around 11.00 a.m. attending to domestic chores. The appellant, who is her neighbour, was cutting a tree alongside their common fence. A branch fell outside the complainant's house and the appellant called her out and asked her what she was doing. He entered the house, closed the door to the sitting room, grabbed the child and clasped her mouth with his hands. It was the testimony of the complainant that the appellant carried her into her bedroom, removed both her dress and pantie and also removed his trouser and defiled her.

[3] Suddenly the door was opened. At the door was H. When the appellant heard this, he quickly dressed up and rushed out through the back door. At that point she told H, her cousin, that the appellant had defiled her. Out of fear, she never told her parents about the sexual assault.

[4] JKL (PW3), the father of the child, is uncle to H. His evidence is that on the material day, he returned home between 3.00 p.m. to 4.00 p.m. when H told him that the appellant had defiled his daughter (PW2). H told him that he heard screams from the kitchen, forced the main door open and saw a man, the appellant, emerge from the house.

[5]. With this information, PW3 confronted his daughter who told him that the appellant had indeed defiled her. He took his daughter to Mosoriot Health Centre but was advised to go to another hospital. The day after, on 19th September, 2010, he took her to Kapsabet District Hospital where she was treated. At 12.50 p.m, he accompanied his daughter to Kapsabet Police Station where she lodged a complaint with P.C Chelagat who issued her with a Police Form 3 (P3 form).

[6] Josephat Embeko, a Clinical Officer, examined the complaint and completed the P3 form. Unavailable to testify, the form was produced by his colleague Julius Murrey (PW1). The clinical officer observed that the hymen was broken, a revelation of sexual intercourse. The details of the report are discussed further in this judgment.

[7] PW4 investigated the complainant and recorded the evidence of various witnesses, including H. She visited the house of the appellant but he was not there and his wife told her that he had not been home since the day of the incident. That it was not until 2nd November, 2010 that the accused surrendered himself to the police.

[8] Placed on his defence, the appellant gave an unsworn statement. He denied the offence and says that he was framed up. He said that this was motivated by a dispute between him and the complainant over some land he had bought.

[9] In this second appeal, the appellant raised five grounds; that the medical evidence produced did not support the offence he faced; that the prosecution case was doubtful and incredible; that he was convicted on charges that did not contain the necessary information; that the court failed to consider his defence; and that the voire dire examination carried on the complainant was unsatisfactory.

[10] As a second appellate court our sole duty is circumscribed under section 361 of the Criminal Procedure Code which is not to retry the case or re-evaluate the evidence or to interfere with concurrent findings of fact by the trial court and the first appellate court unless the findings were bad in law for being perverse which is to say that no reasonable tribunal could on the evidence have arrived at such findings. And we are also enjoined to consider any other issue of law raised. – See the cases of *Thiongo v R* [2004] 1EA 333 and *Muriungi v R* [1982 – 1988] 1 KAR 360 and *Adan Oman & Anor. v R* Criminal Appeal No. 11 of 2002 Nyeri.

[11] Before setting out the submissions made by the parties to this Appeal, we need to restate what has been said many times over in regard to new issues raised in a second appeal and which did not feature in the first. Unless conceded and in rare and exceptional circumstances where good reason is proffered for not raising it earlier, an appellant will not be allowed to raise new grounds in a second appeal. This is because in a second appeal the court tests the correctness or otherwise of the decision of the first appellate court. This cannot be properly done on an issue which was not put to that court. It also

smacks of an afterthought and an improper expansion of an appellant's case. As was noted by this Court in *Alfayo Gombe Okello v. Republic* [2010] eKLR Criminal Appeal No. 203 of 2009; :

> " ....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

See also *Morris Mutie Thomas v Republic* [2016] eKLR and *John Kariuki Gikonyo v Republic* [2019] eKLR

[12]. In the matter before us, the appellant attempts to raise two matters that he did not raise before the High Court. One is about the manner in which the voire dire was conducted on the child before receipt of her evidence and the other is that the charge he answered to and for which he was convicted was defective. We shall not deal with these two at all as they were not properly raised.

[13] The appellant dedicates considerable energy in assailing the medical evidence upon which the trial court relied in returning a finding of penetration. The appellant submitted that the findings of the doctor who first examined the victim found that genitalia and urinalysis to be normal and without presence of spermatozoa. These findings are repeated in the P3 form. That although the hymen was found broken, the appellant takes a view that it is not a sexual act alone that can cause a hymen to break. It was proposed to us that almost all girls of the age of victim (13 years) have their hymen raptured by either physical activities or infections.

[14] It is further argued that the doctor did not give details of the physical injuries, if any, suffered by the victim and the age of those injuries. In support of that contention, the appellant cited the decision of this Court in *Michael Odhiambo vs Republic* HCCCR 280 of 2004.

[15] On another front, we are told to note the finding of the doctor that the victim gave a history of having been "sexually assaulted by known person and it was the 2nd incident." The appellant asked us to make a negative inference of the testimony of the victim as she did testify of the alleged first assault by him.

[16] The appellant further submitted that his cross-examination of the prosecution witness and defence reveal the genesis of the trumped up charges. That it was a land dispute. Both the trial court and the High Court are criticized for failing to put to a scale the weight of the defence vis a vis the inconsistencies and anomalies in the prosecution case. In addition, we were asked to question why H, who would be a crucial witness, was not called to testify.

[17] For the state, it was submitted that evidence of the doctor in the P3 form corroborated the evidence of the victim that there was penetration and defilement. Further, that the acknowledgement of birth notification produced as exhibit 3 was proof of age of the complainant beyond reasonable doubt.

[18] Proof of penetration is an essential ingredient to the crime of defilement and if not sufficiently proved then the offence is unproved. The appellant has invited this Court to find that penetration was not proved beyond reasonable doubt.

[19] The complainant said as follows regarding the incident:

> " He called me outside. I went out. He asked what I was doing. I was then standing on the corridor. I then saw him lock the door to our sitting room. He had entered the house. He came and grabbed me and closed my mouth with his hands. He then carried me into our bedroom and then did bad manners to me. He removed my clothes, I was wearing a dress and inside a pant. He removed both the dress and the pant. He removed his trousers and

pants and then fell me to the floor. He then lay on top of me. He inserted his penis into my vagina. He then began pushing in and out many times."

[20] The witness did not break under cross-examination and evidence of that quality alone would in certain circumstances be sufficient to return a conviction. Indeed, the High Court observed;

> " I now wish to turn to the appellant's main complaint that he had been wrongly convicted on evidence which did not prove the charges against him beyond reasonable doubt. After re-evaluating the evidence on record, I find that contrary to the appellant's assertions, there was no contradictions in the complainant's evidence. I find that PW2's evidence was clear, consistent and straight forward. She gave a graphic and detailed account of how the appellant who is her immediate neighbour and a person she regularly interacted with found her at their home on the material date and defiled her. It is important to note that the offence was allegedly committed at 11.am in broad daylight."

[21] There are however certain other aspects of the case that weaken this otherwise strong part of the prosecution's case.

[22] From the evidence, the victim first visited Mosoriot Health Centre but was advised to go to another hospital. She then attended Kapsabet District Hospital on 19th September, 2010, a day after the alleged incident. The officer who examined her noted as follows in the history;

> " Allegedly to have been sexually defiled by one person well known to her. This being the second time."

On examination he noted that the hymen was broken. The information that she had been assaulted for a second time was repeated. There is no indication that the officer who attended the victim at the hospital is also the one who completed the P3 form. One thing, however, the officer who filled the form was Mr. Josphat Embeko, but because of inability to testify, another Clinical Office (PW1) produced the form and testified on his behalf. In that testimony, PW1 told Court that upon examination, the Clinical Officer had found the victim's genitalia to be normal with no presence of spermatozoa. However, the hymen was broken.

[23] Having looked at the additional remarks by the officer in the P3 form, we noticed the following words;

> " Presence of broken hymen reveals sexual intercourse.
>
> D.T.C. T 3/12"

[24] We further noted that the meaning of "D.T.C" was never explained to the trial Court and when we posed the question to the prosecutions counsel as to what DTC stood for, she did not know. She was however sufficiently gracious to concede that it is important that such terms be explained to the trial court. This so because the meaning of such medical words or terms or acronyms or abbreviations could have a bearing on the probative value to be given to the evidence. When one takes that the medical reports were not sufficiently explained coupled with the finding that genitalia of the victim aged 13 years was said to be normal then the finding that the hymen was broken ,taken by itself, may not count for much.

[25] This is also so because, from the history taken down by the officer, this was the second time she had been sexually assaulted, presumably by the appellant. Yet when testifying the appellant makes no mention of the first assault and we must ask ourselves whether indeed either of them happened.

[26] Something else downgrades the strength of the prosecution case. While, as correctly noted by the trial court that, section 124 of *Evidence Act* empowers a court to convict on the evidence of the complainant only in sexual offences, we think that given the deficiencies in the medical evidence, H was a witness who needed to be called. Who is H and how does he feature?

[27] H is the cousin of the complainant and according to the complainant this is how events played out while the appellant was sexually assaulting her;

> " He then heard the door being opened and dressed quickly. He then walked out. It was my cousin H who was at the door. The accused used the rear door. I rushed to tell H what the accused has done."

It is also H who is said to have told the father of the complainant about the incident. Indeed, the father's testimony was that H told him that he saw the appellant quickly leave the house as he went in.

[28] Although H may not have been an eye witness to the defilement, his evidence would have been critical in assessing the veracity of the evidence of the complainant that he opened the door and walked into the scene so soon after the assault. He would have been able to confirm that he indeed saw the appellant leave in a rush through the back door. The absence of that testimony seems the worse because the record at trial shows the appellant was insistent on whether or when H would testify. Although in the end the Investigation Officer informed the trial court that "the cousin is unwell", the court was not given details of the illness or told that the illness would keep the witness completely or for unreasonably long time away from court. In circumstances like this that we are inclined to find, and do hold, that the absence of a crucial witness was not sufficiently explained by the prosecution and that a negative inference should be made against the prosecution case for withholding his evidence. See, *Bukenya vs Uganda* [1972] EA 549.

[29] The overall state of the prosecution case does not support a safe conviction. We say so even well aware that the appellant appears to have left his home soon after the incident and was at large until 7th November, 2010, about fifty (50) days after the incident. We are also aware that in his defence the appellant did not explain this absence and an inference of guilty could easily be drawn. This, however, does not persuade us that the appellant should not benefit from a prosecution case that was far too tenuous to reach the requisite standard of proof beyond reasonable doubt.

[29] We allow the appeal, set aside the conviction and quash the sentence imposed by the trial court. The appellant shall be released forthwith unless held for some other lawful reason.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR