



**Loriwo v Republic (Criminal Appeal 121 of 2018)
[2022] KECA 853 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KECA 853 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 121 OF 2018
PO KIAGE, A MBOGHOLI-MSAGHA & F TUIYOTT, JJA
APRIL 28, 2022**

BETWEEN

SIMON LORIWO APPELLANT

AND

REPUBLIC RESPONDENT

*((An appeal from the judgment of the High Court of Kenya at Kapenguria
(S. M. Githinji, J) dated 6th December, 2017 in HCCRA NO. 5 OF 2016))*

JUDGMENT

1. In this second appeal, Simon Loriwo challenges a conviction entered and sentence handed down by Hon. Machage in criminal case number 1680 of 2015 and upheld by the High Court at Kapenguria for the offence of defilement contrary to section 8(1) of the *Sexual Offences Act*.
2. At trial, the narrative of the prosecution case was that on the afternoon of 23rd September, 2015, LE (PW2) puts the time to be about 6.00p.m., the complainant was at her home when the appellant visited and asked her for water. She obliged. In a twist of events, the appellant fell on the young girl, removed her clothes and his as well. He inserted his penis into her vagina. As he did so PW2, who sought to shelter in the house, opened the door and found the accused lying on the complainant. The appellant rose up in haste, pulled up his lowered trouser and zipped up. He then took to his heels. News of the defilement got to the mother of the complainant and eventually to LA (PW3), the father of the complainant, who on the day following took the complainant to Alale Health Centre for treatment. There, she was attended to by Rebecca Lomenwo (PW4), a clinical officer. PW4 observed that the victim had a reddened, inflamed and bruised labia. The clinical officer returned a diagnosis of sexual assault.
3. PW2 informed the area chief about the incident and the accused was arrested on 24th September 2015 and escorted to Alale Police Station where CPL Efumbi (PW5) re-arrested and interrogated



- him. The police officer similarly interrogated the complainant and issued a Police Form 3 (P3) to her. After examining the victim at Kapenguria District Hospital, Jeremiah Kisanga (PW6) filled the P3 at Kapenguria District. He also carried out an age assessment on the complainant and was of the view that she was 8 years old. He, just like the first officer at Alale, found clinical evidence of defilement.
4. In his short defence testimony, the appellant told court that he knew the complainant who is, in fact, a relative. He denied committing the offence and said that the case was planted on him after he demanded payment from his relatives.
 5. The trial court found the testimony of the complainant to be “cogent, sharp, steadfast and to the point.” The trial court also found that PW2 gave an eye witness account of the offence, and had little hesitation in convicting the appellant. The High Court re-evaluated the evidence and came to the conclusion that the appellant was rightly convicted and sentenced.
 6. In assailing the decision of the first appellate court, the appellant asserts that he was not accorded a fair trial contrary to Article 50(2) of *the Constitution* and sections 33 and 108 of the *Criminal Procedure Code*; that the prosecution witnesses were hostile; the prosecution case was not proved beyond reasonable doubt; the charge sheet was defective; the trial court failed to consider his defence and the investigations were shoddy and shambolic.
 7. The appellant submits that he was arrested, beaten up and locked in a home in violation of his rights under Article 25(g) of *the Constitution*. Further the violence meted on him infringed on his right to life contrary to Article 26(1)(3) of *the Constitution*.
 8. The appellant complained about the delay before he was arraigned in court.
That he was arrested on 23rd September, 2015 and it was not until 25th September 2015 that he was arraigned before court. He pleads a violation of his rights under Article 49(1)(d), (f)(i) and (ii) and (g) of *the Constitution*.
 9. In respect to the evidence tendered at trial, the appellant points out what he sees as inconsistency in the evidence of PW1. It is said that from the evidence it was not clear whether PW1 had seen or knew the appellant prior to the incident. In regard to PW2, the appellant contends that it was not conceivable that he would have caught him defiling his 8 year old niece without reacting.
 10. The appellant argues that he was facing a charge with a severe sentence and a heavy burden was placed on the prosecution to prove its case beyond reasonable doubt. It was also contended that the two courts below were partial and biased against him.
 11. It was submitted that the appellant was framed for demanding payment of his money from the complainant’s father and that the inconclusive medical evidence is testimony to the frame-up. Arguing that medical evidence is critical in proving a sexual offence, the appellant stated that the medical report revealed no injury on the complainant and it was a lame excuse that medical examination was conducted over 72 hours after the alleged incident.
 12. In response, the DPP denies any infringement of Article 49(1). To his mind the appellant was arrested on 24th September, 2015 and arraigned in court on 25th September, 2015, the day after. He argues that the evidence of the complainant and PW2 was of recognition, which is more assuring and reliable than identification. The DPP took the view that the firm and unshaken corroborative evidence of PW2 and the P3 report confirmed that there was indeed penetration.



13. This is a second appeal and the role of the court is spelt out under section 361 of the Criminal Procedure Code and has been reiterated in numerous decisions of this Court including *Njoroge vs Republic* [1982] KLR 388, where it was stated;

“On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless these findings were shown not to be based on evidence.”

14. *Similarly in Karani vs. R* [2010] 1 KLR 73 this Court expressed itself as follows: -

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

15. Before reflecting on the merit or otherwise of the conviction, we weigh on the alleged infringement of the appellant’s right under Article 49(1) of *the Constitution* which provides the following safeguard: -

- (1) An arrested person has the right—
 - (a) to be informed promptly, in language that the person understands, of—
 - (i) the reason for the arrest;
 - (ii) the right to remain silent; and
 - (iii) the consequences of not remaining silent;
 - (b) to remain silent;
 - (c) to communicate with an advocate, and other persons whose assistance is necessary;
 - (d) not to be compelled to make any confession or admission that could be used in evidence against the person;
 - (e) to be held separately from persons who are serving a sentence;
 - (f) to be brought before a court as soon as reasonably possible, but not later than—
 - (i) twenty-four hours after being arrested; or
 - (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;
 - (g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and
 - (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

16. The specific grievance regarding this provision is the supposed delay in bringing the appellant before the trial court after arrest. The evidence on record is that although the offence is said to have been committed on 23rd September 2015, the appellant was arrested on 24th September 2015 and detained at



Alale police station and arraigned in court on 25th September 2015. The evidence led by the prosecution and the short unsworn statement in defence does not make out a contrary case. Simply, the 24-hour rule was not breached and the alleged violation of the provisions of *the Constitution* does not stand scrutiny of the evidence on record.

17. Yet even if there was an impermissible detention of the appellant, that alone is insufficient to vitiate his trial unless it has been demonstrated that the detention compromised the appellant's ability to adequately prepare and mount a defence. There is no shortage of case law that supports this settled position of the law. See for example *Julius Kaman Mbugua v. Republic* (2010) eKLR and *Albanus Mwasia Mutua -vs- Republic* [2006] eKLR. Here, the appellant neither alleges nor demonstrates that he was in any way hindered him from preparing and mounting an effective defense or that the quality of his defense was in any way compromised. If, nevertheless, it is true that he was detained for a period longer than permitted under the law or his life threatened as he also alleges, his remedy would be elsewhere, in seeking relief in constitutional proceedings. Quashing the conviction is not the answer (See *Evans Wamalwa Simiyu -vs- Republic* [2016] eKLR)

17. Turning to the evidence put forward at trial, we are keenly aware that our duty as a second court is not to re-evaluate the evidence in the sense of a retrial but rather to examine whether the concurrent findings of the courts below are so perverse in the face of the evidence tendered at trial. The evidence of the complainant of the events of the fateful day was consistent, cogent and unshaken. It would not be an easy feat for a child of 8 years to put together such a story unless it was a true account of a traumatic assault of her person. And if there was need for that testimony to be fortified then the evidence of PW2 could not be of greater assistance. He caught the appellant red handed, in the act. The evidence of the victim and PW2 was that of recognition and there is no faulting the concurring findings of the two courts below. The evidence of a defilement was further supported by the medical evidence from Alale where the victim was first taken for treatment. Although the clinical officer did not see external injuries to the genitalia, he found the vagina wall to be inflamed and tender. On further examination, a not dissimilar observation was reached by the medical officer who completed the P3. The officer states:

“Redish/hypersamic labia, sign of sexual harassment”.

19. Regarding the age of the victim at the time of the incident, her father testified that she was 8 years old and this was certified to be so by an age assessment conducted on 25th September, 2015, two days after the incident.

19. In the end, that there was penetration of the vagina of the complainant, a minor aged 8 years, was proved beyond any reasonable doubt. The defiler was the appellant. We find, and so hold, that the conviction returned by the trial court and upheld by the High Court is safe and an unassailable.

21. The age of a victim of defilement is always important as it informs the length of sentence to be imposed on a person guilty of the offence. Here, the complainant was 8 years old and a sentence of life imprisonment was the only available punishment (section 8(2) of the *Sexual Offences Act*). This was the punishment meted out at trial and confirmed at first appeal. It is the lawful sentence and is not open to interference by us.

22. The appeal fails altogether on conviction and sentence and is hereby dismissed.

Dated and delivered at Kisumu this 28th day of April, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

