



Lalo v Republic (Criminal Appeal 38 of 2017) [2022] KECA 500 (KLR) (1 April 2022) (Judgment)

Neutral citation: [2022] KECA 500 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 38 OF 2017
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
APRIL 1, 2022**

BETWEEN

TSUMA LALO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Voi (J. Kamau, J.) delivered on 20th June 2017 in High Court Criminal Appeal No. 21 of 2016)

JUDGMENT

1. The appellant, Tsuma Lalo, was charged with the offence of defilement of a girl contrary to Section 8(1) of the Sexual Offences Act. The particulars of the offence being that on diverse dates between 1st September 2014 and 30th September 2014 within Taita Taveta County, intentionally and unlawfully caused his male organ (penis) to penetrate the female organ (vagina) of MRK a child aged 15 years. He was tried before the Magistrate’s Court at Voi; convicted and sentenced to serve 20 years jail term. His appeal to the High Court was dismissed on 20th June 2017. This is his second appeal.
2. In her testimony MRK (PW1) recalled that on Friday 13th September 2014, the appellant, to whom she referred by the name Omar and also indicated that he is also known as Tsuma Lalo, had gone to their house at [Particulars Withheld] with a vehicle; that at the invitation of the appellant, she, her brother A and two others (B and J) drove up to View Point Club; that on the way back home, MRK’s brother A was dozing and MRK informed the appellant that she was afraid to go home; that the appellant offered his house and allowed her and her brother to sleep there; that at about 1.00 a.m., while her brother was asleep, MRK felt someone, the appellant, on top of her who told her not to say anything. He removed her skirt, biker, and pants and then undressed, and in her words, the appellant “entered his manhood into mine” and told her not to scream else he would harm her. When the appellant went to the toilet, she took advantage to “sneak out” and got home “at around 5.00 a.m.” and showered. Her mother was curious why she was showering early, and she told her that she was in her periods. She did not tell her



- mother what had happened but a month later she had missed her periods and went to Ndovu Clinic and discovered that she was pregnant.
3. On learning that MRK was pregnant, her mother and grandmother questioned her. She disclosed to them that the appellant was responsible. She stated that her father confronted the appellant and that although he initially denied what he had done, he later confessed and proposed to finance her education. The matter was then reported to Voi Police Station. She produced her birth certificate based on which her date of birth was 20th July 1999.
 4. Under cross examination by the appellant, MRK stated that she believed in him when he offered her and her brother accommodation and reiterated that she was in his bed when he climbed on her and threatened her. She was at the time of her testimony (28th May 2015) eight months pregnant.
 5. MRK's brother (PW3), 14-year-old at the time of his testimony on 8th September 2015, stated that on 13th September 2014, the appellant to whom he also referred by the name Omari saying that "Omari is also Tsuma" had parked his vehicle in their neighbourhood; that they drove to View Point where some of the passengers alighted leaving him, his sister MRK and another; that they wanted to go and sleep and the appellant offered them accommodation. In his words, the appellant, "gave us a bed and we slept with my sister. He said he was going to sleep at work. I fell asleep. I never knew what transpired."
 6. MRK's stepmother (PW2) stated that MRK was staying with her during the August vacation; that in September when schools were opening, she was to take transfer forms to transfer MRK from the school she was previously attending [Particulars Withheld] girls when she learnt that MRK was pregnant; that on enquiring from MRK, she initially denied but later confessed; that she took her to Ndovu Health Center where tests done confirmed that MRK was pregnant and stated that the appellant, who she described as a taxi driver and a neighbour, was responsible; that she confronted the appellant and "he never denied" and that "he said he was sorry" and prayed "for forgiveness"; that the appellant agreed to take responsibility for MRK and the child and signed a letter dated 13th December 2014 to that effect; that in December the matter was reported at the Children's office; that the pregnancy was confirmed at Moi District Hospital and on 20th June 2015, MRK gave birth to a boy. PW1 produced P3 form; hospital treatment notes, birth certificate, summons issued to the appellant, and the letter of 13th December 2014 all of which were marked for identification and subsequently produced as exhibits.
 7. On 2nd July 2015, upon application by the Prosecution, the trial court ordered a DNA test to be performed to establish the newborn's paternity.
 8. Dr. Stephen Katana (PW4) a Medical Officer at Moi County Referral Hospital produced a P3 form, treatment notes on behalf of Dr. Ngugi who had examined MRK and confirmed that her hymen was broken and that she was pregnant.
 9. The investigating officer Police Constable Joshua Kopa (PW5) of Crime Office, Gender Office at Voi Police Station stated that following the defilement complaint made by MRK at the police station, a P3 Form was issued; that, following investigations the appellant was arrested on 15th March 2015 and charged; that following the court order, MRK, the appellant and the child sent to the Government Chemist for paternity test which was performed by Dr. George Oguda. It was established that the appellant is the father of the child. He produced as exhibits the birth certificate which indicates the date of birth as 20th July 1999; agreement from children's office, exhibit memo and human identification report by Dr. Oguda.
 10. Dr. George Laurence Oguda (PW6), a Government Chemist was the last prosecution witness to testify. He stated that based on a court order, he took samples from the appellant, MRK and from the child



in order to carry out a DNA test; that using DNA analysis, he established that the appellant is 99.9% the biological father of MRK's child. He produced his report in that regard.

11. In his defence, the appellant denied the offence. He stated that on 15th March 2015 he was going about his business when a police vehicle pulled over next to him; that at the request of the police officers, he boarded the vehicle in order to help the officers transport goods; that at the police station he was bundled into a room and later charged with an offence he knew nothing about. He stated that the investigating officer had a grudge as they had earlier clashed in a pub.
12. As indicated, the trial court was satisfied that the prosecution had established the offence beyond reasonable doubt and convicted the appellant in a judgment delivered on 18th April 2016 and sentenced to serve 20 years in jail. His first appeal to the High Court, which was unsuccessful, was on grounds that: the offence had not been proved to the required standard; that the magistrate erred by believing the medical evidence as having established penetration; that the trial court erred in failing to appreciate the appellant's circumstances and to consider his defence, was rejected.
13. In this second appeal, the appellant in his memorandum of appeal, complained that the Judge of the High Court erred in law by: not reassessing and re-evaluating the whole evidence on record so as to come up with her own independent conclusions; failing to see that the appellant was not issued with necessary documents during the trial such that he could not prepare himself for the matter and his defence; in failing to find that there was a mis-identification of the real perpetrator of the offence; in failing to consider that the appellant, as a layman, should have been assigned an advocate by the state at the expense of the state.
14. However, during the hearing of the appeal before us, in his oral and written submissions, the appellant abandoned his appeal on conviction. In his words, the appeal was "not against conviction but on severity of sentence."
15. This being a second appeal, under Section 361(1) of the Criminal Procedure Code, our jurisdiction is limited to matters of law. As stated by the Court in *Karani vs. Republic* [2010] 1 KLR 73

"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 a matters of law."
16. Section 361(1)(a) of the Criminal Procedure Code provides that

"severity of sentence is a matter of fact". The sentence meted out to the appellant is legal and in accordance with Section 8(1) as read with Section 8(3) of the Sexual Offences Act. We have no mandate therefore to interfere with the same.
17. Moreover, the prosecution evidence against the appellant is overwhelming. All the ingredients of the offence were established. He is a person well known to the complainant and was positively identified as the perpetrator having offered to accommodate MRK and her brother in his house for the night. The complainant's testimony that the appellant "entered his manhood" into her was supported by the medical evidence including the fact that she conceived as a result and paternity established through the DNA test. The complainant's age was established through production her birth certificate. It is not surprising therefore that he withdrew his appeal against conviction.



18. The result is that the appeal has no merit and is therefore dismissed.

DATED AND DELIVERED AT MOMBASA THIS 1ST DAY OF APRIL 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

