RA alias K v Republic (Criminal Appeal 91 of 2018)
[2021] KECA 128 (KLR) (5 November 2021) (Judgment)

Neutral citation: [2021] KECA 128 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 91 OF 2018

HM OKWENGU, MSA MAKHANDIA & F SICHALE, JJA

NOVEMBER 5, 2021

BETWEEN

RA ALIAS K ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from a judgment of the High Court of Kenya at Eldoret Githua, J dated 15th October 2015)IN HC. CRA NO. 15 of 2013)

JUDGMENT

1. RA alias K (the appellant herein), has preferred this second appeal against the judgment of Githua, J. dated 15th October 2015, in which his appeal against conviction and sentence by the Senior Principal Magistrate's Court at Kabarnet for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* (the Act), was dismissed.

2. The particulars of the offence of which the appellant was charged were that on the 9th day of September 2012, in the then East Pokot District within Baringo County, he intentionally and unlawfully caused his male organ to penetrate the female organ of CK (name withheld) a girl aged 15 years.

3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to the provisions of Section 11 (6) of the Act. The particulars of the offence were that at the same time and place, he intentionally and unlawfully caused his penis to come into contact with the vagina of CK.

4. The appellant denied the charge after which a trial ensued. In a judgment delivered on 25th January, 2013, Hon. S.M Soita, the then Senior Principal Magistrate at Kabarnet Law Courts, convicted the appellant of the main charge and sentenced him to twenty (20) 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 15th October, 2015, Githua, J found the appeal to be lacking

in merit and dismissed the same in its entirety and upheld the conviction and affirmed the sentence of the trial court. Undeterred, the appellant has now filed this appeal and probably the last appeal that is now currently before us vide memorandum of appeal dated 15th August, 2016 and subsequently vide what he called amended grounds of appeal and submissions filed in court on 21st December, 2020 raising the following grounds of appeal:

1. That the judge of the High Court erred in law in not finding that medical evidence was insufficient to prove penetration.

2. That the judge of the High Court erred in law in not analysing the whole evidence as incumbent of him as the first appellate court alongside the defence.

3. That the judge of the High Court erred in law in failing to prove that the age of the complainant was not proved by any documentary evidence.

4. That the judge of the High Court erred in law in not finding that the prosecution witnesses were not credible thus unreliable."

6. Briefly, the background to this appeal is that on the night of 9th September 2012 at about 10 pm, PW1 (CK) a girl aged 15 years old was at home and her mother (PW2), was away when the appellant came while armed with a panga and grabbed her saying she was taking her to her mother's house. That CK was with her child who was one week old and when they got to the house, the appellant placed the child on the bed and ordered her to lie on the same bed and warned her against screaming. He proceeded to rape her after which he released her. CK's mother came back in the morning and took her to hospital and that by this time the appellant had escaped. It was CK's further evidence that the appellant was not her biological father but was at the material time cohabiting with her mother (PW2).

7. PW2 was CK. It was her evidence that CK was her eldest child and that the appellant was his friend with whom she had two children. That, on the material day at 4 PM, she was at Maram center whereupon a fight ensued between her and the appellant over allegations of infidelity. It was her evidence that since she feared going home, she slept at a neighbours house and in the morning when she went home, she found CK crying and on inquiry, CK told her that she had been raped by the appellant at night and she was bleeding. That, she went to the bed and noted that it was blood stained whereupon she called elders and further took her to a neighbour's house as she feared that the appellant might rape her again.

8. PW3 was Loyole Samech a neighbor to both PW1 and the appellant. It was his evidence that on 10th September 2012, he was at home when CK was brought by her mother (PW2) with blood stained clothes and told her that the previous night PW1 had been defiled whereupon he decided to call elders and PW1's biological father (PW4).

9. PW4 was KL. He testified that CK was her daughter and that he had separated with her mother (PW2) and that the appellant was cohabiting with PW2. It was his evidence that on the material day, he was at home when a young man came and informed him that on the previous day, the appellant had fought with PW2 and had defiled CK whereupon he decided to report the matter to the chief and at that time the appellant was at large.

10. PW5 was KKL. He testified that he knew CK who was his sister's daughter and the appellant who was his in-law. It was his evidence that on the material day he went to Maram centre and found some people who had gathered and learnt that there was a girl who had been raped. That, after four days, he had some noise coming from the appellant's house and he proceeded there where he found the appellant being attacked by members of the public. He intervened, though the crowd was hostile and insisted

on the appellant being taken to the police but since he was injured, they first took him to hospital first and later to Lorut police station.

11. PW6 was APC Stanely Kwanya attached to Churo DO's office. It was his evidence that on the material day he was on duty when CK was brought to the station by her father PW4 with an allegation of defilement whereupon he booked the report and referred CK to hospital.

12. PW7 was Leonard Chirchir a clinical officer at Marigat hospital. It was his evidence that on 17th September 2012, CK went to the hospital accompanied by her father (PW4) who alleged that a person well-known to them had defiled CK. Upon examining CK, PW7 found the hymen broken, a scar on the left side of the vagina, swollen and tender labia, lacerations on the vaginal wall and blood spots. He concluded that there was forceful vaginal penetration.

13. PW8 was Corporal Peter Okello attached to Loruk police station. It was his evidence that on the material day he was in the office when an administration police officer brought the appellant alleging that he had defiled CK at Maram Centre on 9th September 2012 and disappeared. That, the appellant had injuries and was bleeding and he was informed that he had been beaten by members of the public. That later on, CK was brought to the station whereupon he issued her with a 3 form and recorded her statement.

14. The appellant in his defence gave an unsworn statement and did not call any witness. He denied having committed the offence and further stated that the witnesses in this case were liars and that he had been framed up.

15. When the matter came up for plenary hearing of the appeal on 11th May 2021, the appellant sought to rely on his filed amended grounds of appeal and submissions. Mr. Mugun for the respondent on the hand, while relying on his written submissions dated 6th May, 2021** urged the Court to dismiss the appeal on the grounds *inter alia* that all the ingredients for the offence of defilement had been proved.

16. As regards witnesses' credibility, it was his submission that this was a question of fact which this Court could not address on a second appeal.

17. We have considered the record, the rival oral and written submissions, the authorities cited and the law.

18. 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 ..."
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> 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)."

19. With regard to the first issue, the appellant submitted that the medical evidence on record was insufficient to prove penetration. CK's evidence was *inter alia* as follows:

> "The accused came. He was armed with a panga. He grabbed me and said he was taking me to my mother's house. I was with my child who was one week old. He warned me against screaming. When we got to the house he put the child on the bed and ordered me to lie on the bed. This is the panga he had (MF1). I did as he ordered. He then raped me."

20. In cross examination she stated that it was the first time that the appellant was raping her. The evidence of this particular witness remained firm and uncontroverted even in cross examination. PW2 testified as to how CK narrated to her of having been raped by the appellant the previous night and that CK was bleeding and that when she went to the bed, she saw that it was blood stained. PW3 corroborated the evidence of PW2 when he testified that CK was brought to her home by PW2 and that CK's clothes were blood stained as well as her thighs. On the other hand, PW7, the clinical officer who examined CK testified *inter alia* thus:

> "On examination I found the hymen broken. there was a scar on the left side of the vagina. Both labia were swollen and tender. There were lacerations on the vaginal wall. There were blood spots. I concluded there was forceful vaginal penetration." (Emphasis supplied).

21. PW2, 4, 6 and 8 all gave clear and detailed evidence as to how CK was defiled by the appellant. The evidence of this particular witnesses remained firm and uncontroverted throughout the trial and was not rebutted in cross examination.

22. It is not lost on this Court that CK was defiled one week after she had given birth. Secondly, there is no requirement in law that penetration be proved by way of medical evidence only since penetration can be proved through other means such as oral evidence. Indeed, this Court (differently constituted) in the case of *Kassim Ali v Republic* [2006] eKLR stated as follows:

> "Moreover, as the superior court correctly held, the commission of a sexual offence can be properly corroborated by circumstantial evidence (see *Ongweya v. Republic*[1964] EA 129). So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

23. From the circumstances of this case and in light of CK's evidence which remained firm and cogent and which evidence was further corroborated by PW7, the clinical officer who confirmed that there was forceful vaginal penetration of CK due to lacerations he observed on the vaginal wall, we are satisfied just like the trial court and the High Court that penetration was indeed sufficiently proved and that it was the appellant who defiled CK and no one else. Consequently, this ground of appeal fails.

24. The High Court was also faulted for not analyzing the whole evidence as is incumbent of a first appellate court alongside the defence. First of all, there is no prescribed format for re-evaluation of evidence to which the first appellate court should conform to. Such an undertaking will of course depend on the circumstances of each case and indeed it will be appreciated that different courts have different writing styles and of evaluation of evidence. Be that as it may, we have carefully perused the record. The High Court at paragraph 5 of the judgment while reminding itself of this duty stated thus:

> "this being a first appeal to the High Court, this court is duty bound to evaluate afresh the evidence tendered before the trial court to draw its independent conclusions concerning the

validity or otherwise of the conviction. In doing so, I must bear in mind that I did not see or hear the witnesses."

25. Thereafter, the High Court proceeded to analyze the evidence on record and arrived at the conclusion that it did. Again, at paragraph 10 of the judgment, the High Court, stated that it had considered the grounds of appeal, the submissions by the appellant and the State, as well as the evidence tendered before the trial court. Accordingly, this ground of appeal must of necessity fail.

26. With regard to the defence, the High Court at paragraph 9 of the judgment noted *inter alia* that; "the appellant elected to give an unsworn statement and did not call witnesses."

27. At paragraph 12, the High Court while considering the issue of the defence which had been raised before it stated thus:

> "from the trial court's record, it is clear that the appellant's claim that the learned trial magistrate arbitrary (sic) rejected his defence is not correct. The learned trial magistrate in his judgment reproduced the appellant's statement in defence after which he stated as follows:
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> I do not believe his defence that he was framed up so that PW4 could have PW2 back as a wife. I have paid particular attention to the evidence of PW3 who set the ball rolling. It was the testimony of the accused that it was PW3 who called him out before he was attacked. This issue was not brought up during cross examination of PW3. I dismiss this as an afterthought. I have no doubt in my mind that the accused defiled the complainant as alleged. I do find the accused person guilty of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* and convict him accordingly. The above leaves no doubt that the learned trial magistrate properly considered the appellant's defence and dismissed it as an afterthought. Nothing therefore turns on that ground of appeal."

28. From the circumstances of this case and contrary to the appellant's contention, not only did the High Court remind itself of its duty as a first appellate court, it went ahead and re analyzed the evidence on record and the defence and drew its own independent conclusions and we have no reason to fault the High Court for the conclusion(s) it arrived at. Consequently, this ground of appeal is without merit and the same must also fail.

29. The High Court was also faulted for failing to find that the age of the complainant was not proved by any documentary evidence. CK who was the complainant in this case testified that she was 15 years old. The P3 form which was produced in evidence by PW7 gave CK's age as 15 years. As was stated in the Ugandan case of *Francis Omuroni –vs- Uganda, Criminal Appeal No. 2 of 2000*:

> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense".

30. In the instant case, PW7, the clinical officer who examined CK gave her age as 15 years. Consequently, nothing turns on this point.

31. Finally, the High Court was faulted for relying on the evidence of prosecution witnesses who were not credible and were thus unreliable. We have carefully analyzed the record, save for the appellant making general allegations that the prosecution witnesses were not credible, the alleged specific witnesses who were not credible were not stated. With regard to the alleged blood stained clothing which in the

appellant's own words he stated "were supposed to be very important exhibit for identification", the trial court stated *inter alia* as follows:

> "unfortunately, these beddings were never preserved for evidence. PW2 is a lay person and a rural mother who did not appreciate the evidential value of such beddings, I can imagine her agony and desire to erase the nightmare she was going through by washing these beddings and even the clothes of the complainant."
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> The trial court further stated:
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> "medical evidence adduced before me confirmed that there was forceful vaginal penetration due to the lacerations on the vaginal wall and I believe this entry was the accused's. I don't believe his defence that he was framed up so that PW4 could have PW2 back as a wife."

32. Nobody could have said it better than the learned trial magistrate who had the opportunity of seeing the witnesses testify.

    The High Court on the other hand at paragraph 17 of the judgment stated thus:

> "in view of the foregoing, I'm satisfied that the learned trial magistrate properly analyzed the evidence before him and arrived at the correct conclusion that the prosecution had established the offence of defilement against the appellant beyond any reasonable doubt. I thus find that the appellant was properly convicted."

33. 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 that there was penetration of CK's vagina and that the penetration was caused by the appellant. The offence of defilement was therefore proved against the appellant beyond any reasonable doubt and that there was overwhelming evidence to sustain his conviction for the offence.

34. Accordingly, we find that the High Court was right in upholding the appellant's conviction for the offence of defilement and consequently dismiss the appellant's appeal on conviction.

35. With regard to sentencing, the appellant was sentenced to 20 years' imprisonment. CK, the victim was 15 years old at the time of commission of the offence. Section 8 (3) of the *Sexual Offences Act* prescribes a minimum sentence of 20 years for any person convicted for the offence of defilement of a minor aged between 12 and 15 years. As was rightly submitted by the respondent, the circumstances in which the offence was committed were aggravating. The appellant who was CK's stepfather mercilessly defiled her just one week after she had given birth. The appellant was actually lucky that he did not get an enhanced sentence. The sentence of 20 years that was imposed on the appellant was lawful and we see no basis of disturbing the same.

36. The upshot of the foregoing is that the appellant's appeal on both conviction and sentence is without merit and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed

DEPUTY REGISTRAR