Koech v Republic (Criminal Appeal E020 of 2022)
[2024] KEHC 6399 (KLR) (30 May 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E020 OF 2022

RL KORIR, J

MAY 30, 2024

BETWEEN

PHILIP KIPYEGON KOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number 50 of 2019 by Hon. Omwange J. in the Magistrate's Court at Sotik)

JUDGMENT

1. Philip Kipyegon Koech (now Appellant) was tried by Hon. J. Omwange, Senior Resident Magistrate for the offence of gang defilement contrary to Section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 3rd October 2019 at (Particulars withheld) village in (Particulars withheld) Sub County within Bomet County intentionally and unlawfully caused his penis to penetrate the vagina of M.C, a child aged 7 years.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 3rd October 2019 at (Particulars withheld) village in (Particulars withheld)Sub County within Bomet County, he intentionally touched the vagina of M.C, a child aged 7 years with his penis.

3. The Accused/Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called seven (7) witnesses in support of its case.

4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.

5. At the conclusion of the trial, the Appellant was convicted and sentenced to serve twenty (20) years in prison.

6. Being dissatisfied with the Judgment dated 11th May 2022, Philip Kipyegon Koech appealed against the trial court's conviction and sentence on the following grounds reproduced verbatim:-

    i. That, I pleaded not guilty to the charges and maintain the same.

    ii. That the learned trial magistrate erred both in law and fact by convicting I the Appellant to 20 years imprisonment while basing his conviction on uncorroborative, tainted evidence and scarcity. (sic!)

    iii. That the learned trial magistrate erred in law and fact without observing that the Prosecution case was not proved beyond reasonable doubt.

    iv. That the learned trial magistrate erred in law and in dismissing my plausible defence.

    v. That I wish to be present during the hearing and disposal of this Appeal in bid to impose as sentence as per the discretion of this court.

7. The Appellant further filed Amended Grounds of Appeal on 17th November 2022 and relied on the grounds reproduced verbatim as follows:-

    i. That the learned trial Magistrate erred in law & fact in depending on identification which was insufficient to sustain the conviction.

    ii. That the learned trial Magistrate erred in law and fact in not observing that a crucial witness was not called to testify one (Beatrice) grandmother to PW2.

    iii. That the learned trial Magistrate erred in law and fact by failing to comply with section 211 of the CPC.

8. This being the first appellate court, I am conscious of the duty to re-evaluate the evidence given at the trial court. See Pandya vs. Republic (1957) EA 336.

The Prosecution's Case.

9. It was the Prosecution's case that the Appellant defiled M.C (PW2) on 3rd October 2019. M.C testified that on the material day, the Appellant penetrated her female genital organ using his male genital organ. That she went to school the following day and her teachers (PW4, PW5 and PW6) noticed that PW2 was walking abnormally with her legs apart and upon inquiring what the problem was, PW2 informed them that the Appellant had done bad manners to her. The teachers examined PW2's genitalia and pant and found blood stains and mucus. PW2 was then taken for medical examination and attention.

10. Daniel Too (PW3) who was the clinical officer testified that he examined the minor (PW2) on 5th October 2019 and found that PW2's hymen was freshly broken and bruises on her genitalia. PW3 also fund blood in her urine and leucocytes which was a sign of injuries and abrasion. It was his conclusion that there was evidence of penetration.

The Appellant's Case.

11. The Appellant, Philip Kipyegon Koech denied committing the offence. He stated that he did not know any of the Prosecution witnesses and did not know the scene of the crime. He stated that on 3rd October 2019, he was arrested by two people who took him to Mogogosiek Police Station and later to court where he was charged with the offence of defilement.

12. On 17th October 2022, I directed that this appeal be dispensed off by way of written submissions.

The Appellant's Submissions.

13. It was the Appellant's submission that this court ought to disregard the victim's (PW2) evidence on identification. That PW2 failed to give the mode of light present during the commission of the offence. It was the Appellant's further submission that the victim should have given a detailed description of the Appellant as there were many people named Philips in the locality. He submitted that an identification parade ought to have been conducted.

14. The Appellant submitted that the Prosecution deliberately failed to summon a crucial witness (Beatrice). He relied on section 143 of the *Evidence Act*.

15. The Appellant submitted that the trial court violated section 211 of the Criminal Procedure Code as no prima facie case had been made against him. That the trial court failed to re-explain the substance of the charges as required by section 211 of the Criminal Procedure Code.

16. It was the Appellant's submission that there was no credible evidence to link him with the commission of the offence.

The Prosecution's/Respondent's Submissions.

17. The Respondent submitted that the victim was aged 7 years at the time of the commission of the offence. That a clinic card (P.Exh 4) was produced as evidence and further that the Appellant did not challenge the age of the victim.

18. It was the Respondent's submission that there was no doubt that PW2 had been defiled. That PW2 narrated to the trial court how the Appellant undressed her and penetrated her female genital organ using his male genital organ and she felt a lot of pain. It was the Respondent's further submission that the clinical officer (PW3) found that PW2's hymen was freshly broken and had bruised genitalia which was evidence of penetration.

19. The Respondent submitted that it was clear from the record that the victim knew the Appellant very well. That the victim, her grandmother and the Appellant used to sleep in the same house. The Respondent further submitted that the victim used to sleep on the floor while the Appellant and her grandmother used to sleep on the bed.

20. It was the Respondent's submission that the Appellant was the boyfriend to the victim's grandmother and it was during one of those nights that the Appellant left their bed and went to the mattress where the victim was sleeping and defiled her. That the Appellant was also identified in court by his name.

21. The Respondent submitted that Appellant denied committing the offence. That the victim was 7 years old and he could not give a reason why a 7 year old child would want to frame him. The Respondent further submitted that he Appellant did not avail any other witness to support his evidence.

22. It was the Respondent's submission that the trial court was lenient in sentencing the Appellant as it gave the Appellant the minimum sentence. It was their further submission that the Appeal lacked merit and the trial court's sentence and conviction ought to be upheld.

23. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal filed on 10th May 2022, the Amended Grounds of Appeal and Appellant's written submissions both filed on 17th November 2022, the Respondent's written submissions filed on 28th February 2024 and the following issues arise for my determination:-

    i. Whether the Prosecution proved its case beyond reasonable doubt.

ii. Whether the Defence placed doubt on the Prosecution case.

iii. Whether the Sentence preferred against the Appellant was harsh and severe.

i. Whether the Prosecution proved its case beyond reasonable doubt.

24. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.

25. Rule 4 of the Sexual Offences Rules of Court 2014 provides that:-

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

26. No. 78300 Cpl Arthur Kandie (PW7) who was the Investigating Officer testified that M.C (PW2) was aged 7 years at the time the offence was committed. He produced a Clinic Card as P.Exh 4 as evidence. I have looked at the Clinic Card and it indicates that M.C was born on 10th October 2012. I have also considered the evidence of MC (PW1) who testified that PW2 was born on 10th October 2012. The Appellant did not cross examine PW1 and PW7 on the victim's age.

27. From the above testimonies and the evidence contained in P.Exh 4, I am satisfied that PW2 was born on 10th October 2012 which was a few days shy of her 7th birthday at the time the offence was committed. It is my finding therefore that the victim (PW2) was aged 6 years at the time the offence was committed.

28. With regard to the issue of identification, the Court of Appeal in the case of Cleophas Wamunga vs Republic(1989) eKLR expressed itself as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger....."

29. The victim (PW2) testified that they used to sleep in the same house with her grandmother (B) and the Appellant. That on the material day, the Appellant removed her under pant and did "bad manners" to her. While giving her testimony, PW1 identified the Appellant in court as the person who did bad manners to her. PW2 further testified that she thereafter informed her grandmother and teachers that the Appellant had defiled her.

30. When the Investigating Officer (PW6) was cross examined by the Appellant, he stated that the Appellant was the boyfriend to the victim's grandmother (B). He further stated that he had charged the grandmother with child neglect.

31. There was no eye witness to the offence except the victim (PW2). The law allows the court to convict solely on the victim's evidence if it is satisfied that the victim is truthful. Section 124 of the *Evidence Act* states as follows:-

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim

and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

32. I have no reason to disbelieve the victim's testimony on identification. It is evident that the victim (PW2) lived with her grandmother and on the material day, the grandmother, the victim and the Appellant all slept in the same house and by virtue of being the grandmother's boyfriend, the Appellant was well known to the victim. Additionally, the victim also positively identified the Appellant in court as the perpetrator.

33. Flowing from the above, I am satisfied that the Appellant was positively identified by the victim (PW2). There was no possibility of mistaken identity.

34. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.

35. Penetration can be proved through the evidence of the victim corroborated by medical evidence. In the instant case, I shall carefully evaluate the victim's testimony and the medical evidence tendered.

36. M.C (PW2) testified that on the material day (3rd October 2019), the Appellant removed her under pant and inserted his male genital organ into her female genital organ. That on the following day, she informed her teachers of her predicament and when the teachers, Margaret Chelangat Sang (PW4), Joyce Koech (PW5) and Sarah Tonui (PW6) examined her, they found her under pant stained with blood and a mucus substance.

37. Regarding the medical evidence, Daniel Too (PW3), a Clinical Officer at Mogogosiek Hospital testified that he examined the victim (PW2) testified on behalf of Julius Magut. He testified on 5th October 2019. That he found her hymen had been freshly broken and that her genitalia was bruised. He further testified that there was blood in the victim's urine and epithelial cells and he concluded that the victim had been penetrated. PW3 produced a P3 Form and a PRC Form and the same were marked as P.Exh 1 and 2 respectively. I have gone through the P3 Form and PRC Form and both confirm the findings as testified by PW3. It is salient to note that the Appellant did not cross examine the Clinical Officer (PW3) on his medical findings.

38. I accept the medical evidence presented by PW3 that there was penetration. He observed numerous pus and epithelial cells. He also observed a freshly broken hymen and bruised genitalia which in his professional opinion showed vaginal penetration.

39. In light of the above and in addition to the victim's testimony, it is my finding that the victim (PW2) was penetrated by the Appellant on the material day.

40. It was a ground of the Appeal that the Prosecution did not call the grandmother (Beatrice) who in the Appellant's opinion was a crucial witness. Section 143 of the *Evidence Act* provides as follows:-

> No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.

41. In Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005 the Court of Appeal held as follows:-

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of

that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

42. This court holds the position that the Prosecution has the discretion on the number of witnesses it wishes to call. The court cannot therefore dictate or compel the Prosecution on the number of witnesses it should avail as long as the Prosecution proves its case through the witnesses it presents.

43. This court agrees with the Appellant that the victim's grandmother was a necessary witness. This is because the victim stated that she slept in the same room with her and the Appellant. The investigation also showed that the Appellant was her boyfriend. Her level of negligence was astounding. She shared a bed with a man who descended on the hapless child. It was not clear why she did not protect her granddaughter. However the fact that she was not called as a witness does not negate the proven facts that the victim was defiled and the Accused who was identified as the defiler was her grandmother's boyfriend.

44. It was also a ground of the Appeal that the trial court violated section 211 of the Criminal Procedure Code when it failed to explain the substance of the Charges to him. Section 211 of the Criminal Procedure Code provides that:-

(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

45. The Court of Appeal in Martin Makhakha vs Republic (2019) eKLR held:-

"Section 211 of the Criminal Procedure Code requires that the rights of an accused person be explained to him at the close of the prosecution case and when he is being put on his defence. These rights are:

(a) The right of remaining silent and saying nothing.

(b) The right to make an unsworn statement from the dock in which event the accused is not liable to cross examination by the prosecution.

(c) The right to give sworn evidence from the witness box in which event the accused becomes liable to cross examination by the prosecution if the prosecution wishes.

(d) The right to call witnesses if the accused so wishes.

The rights under section 211 of the CPC are crucial rights of an accused person in a trial that are meant to ensure fair trial. When they have been explained to an accused, he responds by electing to proceed as he wishes. His response ought to be taken down and ought to

appear on the court record. The accused is then called upon to proceed in the way he has elected....."

46. The Record before me shows that on 23rd December 2021, the trial court found that the Appellant had a case to answer and further directed that the Appellant must comply with section 211 of the Criminal Procedure Code. The Record also shows that on 13th January 2022, the directions as captured in section 211 of the Criminal Procedure Code were read and the Accused replied:-

"I will tender sworn testimony and call no witnesses."

47. In my view, the Appellant understood the contents of section 211 of the Criminal Procedure Code when he elected to give sworn testimony and call no witnesses in his defence. There was no failure of justice and the Appellant's complaint in that regard lacks merit and I reject it.

48. Based on the totality of the evidence before me, it is my finding that the Prosecution satisfactorily established the age of the complainant, proof of identification and penetration.

ii. Whether the Defence placed doubt on the Prosecution's case.

49. The Appellant (DW1) denied committing the offence and he did not know the Prosecution witness who had testified. DW1 testified that he was arrested on the material day and taken to Mogogosiek Police Station before being arraigned in court

50. I have considered the defence of the Appellant and it is my finding that it was a mere denial. His defence was weak and as a whole, did not cast any doubt on the Prosecution's case which I have already found proven.

iii. Whether the Sentence preferred against the Appellant was harsh and severe.

51. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. The Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, (1954) EACA 270, held as follows:-

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

52. The penal section for this offence is found in section 8(2) of the *Sexual Offences Act* which states 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

53. As earlier stated, the trial court sentenced the Appellant to serve 20 years imprisonment.

54. Having considered the circumstances of this case and the fact that the victim was aged 6 years old at the time the offence was committed, it is my finding that the trial court handed down a very lenient sentence. Had the Appellant been served notice of enhancement of sentence, this court would have had no hesitation in enhancing his sentence to life imprisonment as prescribed by section 8(2) of the *Sexual Offences Act*. I therefore have no reason to interfere with the sentence issued by the trial court.

55. Flowing from the above, it is my finding that the Appeal lacks merit and it is consequently dismissed. I uphold both conviction and sentence.

56. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 30TH DAY OF MAY, 2024.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant and Mr Njeru for the State and Siele(Court Assistant)