Lekiluai v Republic (Criminal Appeal E170 of 2022)
[2024] KEHC 6590 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6590 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E170 OF 2022

LW GITARI, J

MAY 30, 2024

BETWEEN

LEIMAN LEKILUAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

A. Introduction

1. The appellant herein was convicted of the offence of defilement contrary to Section 8(1)(2) of the *Sexual Offences Act* and acquitted of the alternative count of committing an indecent act with a child contrary to Section 11(1) of the said Act. He was sentenced to serve 30 years imprisonment.

2. Being dissatisfied with the said conviction and sentence, he appealed to this court vide a petition of appeal dated 14.11.2022 which was filed on 16.11.2022 by the appellant.

3. The grounds of Appeal are:

    i. That the learned trial magistrate erred in matters of Law and fact by failing to note that the evidence adduced was not sufficient to sustain the conviction.

    ii. That the learned trial magistrate erred in law and facts by failing to note the charges were framed up because of grudge.

    iii. That the learned trial magistrate erred in law and facts by failing to note that the evidence of broken hymen is not proof of defilement.

    iv. That the learned trial magistrate erred in law and facts by failing to note that the sentence was harsh and excessive.

v. That the learned trial magistrate erred in law and facts by not observing that the evidence adduced by the prosecution witness were uncollaborating and inconsistence.

vi. That the learned trial magistrate erred in both law and facts by failing to note that the testimony of the complainant contradicts the evidence of the expert(doctor).

vii. That the learned trial magistrate erred in both law and facts by failing to note that no independent witness in this matter to clear doubts.

viii. That the learned trial magistrate erred in law and fact by rejecting the appellant defence without giving any cogent reason.

ix. That he wished to be availed during the trial proceedings and judgement.

x. That the learned trial magistrate erred in matters of law and fact by failing to that there was a grudge between the mother of the Appellant and the aunt of the complainant.

xi. That the learned trial magistrate erred in Law and facts by failing to note that there was need of identification parade for proper identification of the Appellant.

xii. That the learned trial magistrate erred in Law and facts by not observing that the evidence adduced by the prosecution witness were uncollaborating and inconsistence.

xiii. That the learned trial magistrate erred in law and fact by rejecting the appellant defence without giving any cogent reason.

He prays that the conviction be quashed, the sentence be set aside and he be set at liberty.

4. Directions were taken that the appeal be canvassed by way of written submissions and each of the parties submitted in support of their rival positions.

B. Submissions by the parties

5. The appellant substituted his former grounds to the instant grounds namely:

i. That the learned trial magistrate erred in law and fact by failing to note that the key witnesses were not called.

ii. Thatthe learned trial magistrate erred in law and fact by failing to note that the incident took place at night thus the light used to identify the appellant was not analysed.

iii. Thatthe learned trial magistrate erred in both law and fact by failing to note that the prosecution failed to prove their case beyond reasonable doubts.

iv. That it is my humble prayer for the judge to consider section 333 (2) of the criminal procedure code pretrial detention period.

v. That the learned trial magistrate erred on both law and fact by failing to note that the investigation was shoddy.

vi. That the learned trial magistrate erred in both law and fact by rejecting the alibi defense without cogent reasons.

6. The Appellant submitted that the prosecution failed to prove their case against the appellant. That the evidence tendered by PW1 and PW2 was not enough to convict the appellant herein since the key witnesses were not called. The Appellant submitted that the prosecution witness PW2 told the court

that the members of the public came and wanted to lynch him while he was inside the car and he further stated that he was assisted by members of the public to pull him outside the car. The Appellant contention is why the prosecution failed to summon the members of the public to support their case.

7. The Appellant submitted that there was need to call those vital witnesses. The Appellant relied in the case of David Mwingirwa vs Rep (2017)eKLR.

8. The Appellant further submitted that the trial magistrate erred in law and fact by failing to note that the incident took place at night and thus the light used to identify the appellant was not analysed.

9. The Appellant submitted that positive identification of an accused is an essential element of any offence and it is a fundamental part of the criminal process. That properly obtained, preserved and presented eye witness testimony directly linking the accused to the commission of the offence is likely the most significant evidence of the prosecution.

10. The Appellant submitted that the circumstances surrounding the scene was not clear to identify the attacker. The Appellant relied in the case of Toroke v Republic and the case of Republic v Turn bull (1976) 3A 11 ER 549.

11. The Appellant further submitted that the trial magistrate failed to take into consideration the period spent in custody during the trial as provided under Section 333 (2)b of the Criminal Procedure Code.

12. The Appellant submitted that he was arrested on 15th August 2019 and he was brought to court on 16th August 2018 after the trial he was convicted and sentenced to serve 30 years imprisonment on 9th November, 2022. The Appellant submitted that the time he spent in custody was not considered.

13. The Appellant relied on Article 23 (1) of *the Constitution* that the court should correct the patently injustice decision wherein failure to do so would amount to subjecting the accused to serve a sentence which is unlawful or legally excessive.

14. The Appellant further submitted that the trial court rejected his defence which contained some reasonable facts to support his acquittal. The Appellant prayed the appeal to be allowed.

15. The respondent submitted that Section 8 (1) (2) of the *sexual Offences Act* prescribes the sentences to all accused persons convicted of defilement which involves a minor and conforms to the principles of fair trial that accrues to accused persons as provided under Article 25 (c) of *the Constitution* which is absolutely right.

16. The respondent submitted that the sentence does not rob the appellant an opportunity for an individualized sentence which takes into consideration factors relating to the appellant's personal information and the circumstances surrounding the offences committed.

17. It is the respondent's submission that the sentences prohibited the appellant from being considered after presenting mitigation evidence to the court thereby depriving the appellant his right to a fair trial under Article 25 (c).

18. The respondent submitted that Section 8 (1) b(2) of the *Sexual Offences Act* prescribes the sentences to be meted on to all accused persons convicted of defilement which conforms to the fact that the circumstances of each case does not vary from one another. That there is a requirement for individualized sentencing in implementing the aforementioned sentences.

19. The respondent submitted that the sentence should be imposed in exceptional circumstances which may require severe deterrent punishment.

20. It is the respondent's submission that all persons charged under the provisions of Section 8 (1) (2) of the *sexual offences Act* are treated the same way at the sentencing stage by imposing the imprisonment sentence provided for under the sections of statute aforementioned which is not oppressive and does not violate one's constitutional right.

21. The respondent submitted that the sentence mentioned under the provisions of Section 8 (10) of the *Sexual Offences Act* does allow judges and Magistrates to imposes sentences after considering any mitigating circumstances, the diverse character of the convict and the circumstances of the crime committed.

22. The respondent further submitted that from the above submissions it is clear that Section 8 (1) (2) of the *Sexual Offences Act* does not violate the rights of an accused person to be accorded a fair trial under Article 25 (c) and article 50 (2) of *the Constitution*.

23. The respondent submitted that the sentence as brought forth is just and fair as they do not deprive the courts the power to exercise judicial discretion and award appropriate sentences after receiving such evidence as they think/deem fit.

24. The respondent relied in the cases of Francis Karioko Muruatetu & another petition No.15 & 16 (consolidated) of 2015 vs republic at the Supreme court of Kenya, Philip Mueke Maingi & 5 others petition No. E 017 of 2021 vs DPP at Machakos High court, Francis Omuroni vs Uganda court of Appeal criminal No.2 of 2000, Hassan Mutwiri vs Republic petition No. E015/2022 at Meru High court and Charles Wamukoya Karani vs Republic Cr.Appeal No.72 of 2013.

25. The respondent submitted that the case was proved beyond reasonable doubt.

Duty of first appellate court

26. The duty of this court while exercising its appellate jurisdiction (1st appellate court) as was set out by the Court of Appeal in Okeno v. Republic [1972] E.A. 32 and re-stated in Kiilu and another vs. R (2005) 1 KLR 174 is to submit the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. The court should be guided by the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See Gunga Baya & another v Republic [2015] eKLR). However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform but the evaluation should be done depends on the circumstances of each case and the style used by the first Appellate Court and while the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance. (See Alex Nzalu Ndaka v Republic [2019] eKLR).

C. Analysis of the evidence before the trial court

27. In a summary, PW1 testified that on a certain day he was with his grandfather at night. They had gone to buy food in town. That he left him in the motor vehicle where he was sleeping and he was in the front seat.

28. PW1 stated that somebody came in the car and removed his trouser and defiled him.PW1 testified that the Appellant defiled him and it made him feel a lot of pain from his back and he touched his buttocks.

29. PW1 testified that he had slept in the seat since it had been stretched and he did not see this person as it was dark. He screamed and his grandfather came and removed that person from the motor vehicle.

30. PW1 stated that his grandfather then took him to hospital and he was treated though he was not given any drugs.

31. PW1 was cross examined and he testified that the car had not been locked and it had a window and he did not know how the Appellant opened the door.PW1 testified that it was around 8.00 pm.

32. PW2- Festus Gitongatestified that on 14th August 2019 at 9.30 p.m. was at Archers post having closed his business.PW2 further testified that he used to stay with a child.

33. It was PW2's evidence that he had gone to buy meat from the butchery and he left the child sleeping in the car and when he was coming back from the butchery he noted that there was some movement inside the car. He saw from the window somebody inside the car.

34. PW2 testified that when he reached the car he saw the man with the child's under pant and trouser outside the motor vehicle. That he opened the car and found the accused having lowered his trouser to the knee level. That he was struggling to get hold of the child who now had gone to the boot of the car.

35. PW2 stated that his car was a station wagon. That he struggled with him and he raised the alarm. That he managed to struggle with him and restrain him while he was inside the car.

36. PW2 testified that members of the public came and wanted to lynch him while he was still inside the car. That he was then assisted by the members of the public and they pulled him out of car and his trouser was still down on knee level.

37. PW2 stated that the public were almost lynching the accused when the police on patrol came and rescued the accused from the members of the public and he was taken to Archers post police station and he took the child to Archers post dispensary.

38. It was PW2's evidence that the child was 5 years by then since he was born on 20th July 2014.PW2 produced a copy of the birth certificate marked PMF1-1

39. PW3 testified as Chris Hunters Omil Keitaand he was a nursing officer at Archers Post Mission hospital.PW3 testified that on 15th August 2019 a child was brought by his grandfather without shorts. That there was slight lacerations and inflammation of the anal tissues and some wetness on the anal area visible.

40. PW3 testified that on general physical examination. The child was dull and had difficulty walking and he concluded that the act had occurred approximately 30 minutes before.

41. PW3 further testified that the probable weapon is a blunt object possibly the head of the penis of a male human being. That the external anal area was inflamed with tissue injuries probably due to forcible entry of a blunt object possibly a head of penis.

42. PW3 stated that there were visible fluids which could be ejaculatory fluid.PW3 produced a P3 form filed on 15th August 2020 produced as exhibit 2.

43. PW3 confirmed that penetration occurred owing to inflammation and redness of the anal area and he confirmed that there was penetration of the minor.

44. PW4- PC Josphat Rukwarotestified basically as having investigated the matter. That on 14th August 2019 at around 21.30 hours Festus Gitonga made a phone call to the station stating that around 21.30 hours he had found a man in his vehicle defiling his grandchild. That the complainant was a male child.

That the accused was sodomizing the minor by then he was aged 5 years.That they rushed to the scene and found one Leiman Lokiluai,the accused who had been apprehended and prevented from escaping from the motor vehicle by the members of the public. That they arrested him and took him to the police station. That they further escorted the victim to Archers Mission Health Centre and the doctor examined the minor and confirmed that he had been defiled. That they filed a P3 form that was filed and which was produced in court. He then preferred the charges against the accused person.

45. The appellant was placed to his defense and his evidence was basically that he never committed the offence and that on the 15th August 2018 at around 21.30 he was from watching football at Archers post when he was apprehended by some Meru men who assaulted him. That the bar man stayed with him until the police came to arrest him. That the man alleged that he was a stranger and a thief.

A. Issues for determination

46. I have considered the and analyzed the evidence which was tendered in the trial court by both the appellant and the prosecution (in compliance with the duty of this court as was laid down in Okeno -vs- Republic (supra) and re-stated in Kiilu and another -vs- R (supra)), the grounds of appeal as raised on the petition of appeal and the rival written submissions, it is my view that the issues this court ought to determine are whether the prosecution tendered sufficient evidence to prove its case to the required standards and whether the sentence meted on the appellant was excessive.

B. Determination

47. The Appellant submitted that trial magistrate erred in law and fact by failing to note that the key witnesses were not called. In his submission the key witness he submitted to not have been called are members of the public.

48. I opine that the members of the public were not necessary in this instant for reasons that they did not witness the offence he was charged for and therefore their presence in the trial would have been of no probative value. The prosecution tendered the evidence of PW1, PW2, PW3 and PW4 which in my opinion was sufficient.

49. As I have already stated, the appellant was charged with the of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006 in the main count and the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

50. Section 8(1) provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement". Section 8(2) on the other hand provides that "a person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life.

51. It is therefore clear from these provisions and its indeed trite that for the charge of defilement to stand, the prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. The standard of proof is settled and its beyond any reasonable doubts.

52. As to proof of age, the importance of proving the same was emphasized by the Court of Appeal in Kaingu Kasomo -vs- Republic, Criminal Appeal No. 504 of 2010 (UR) where the court stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of

rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

53. In the case before the trial court, PW2 produced a copy of the birth certificate (P.MF1-1) which indicates that she was born on 20.07.2014. The incident allegedly took place on 15.08. 2019.It is clear that at the time of the offence, the victim was 5 years as at the time of the offence and thus a child within the meaning of the law. I thus agree with the trial court's finding as to the prove of the age of the minor. I find that indeed the same was proved.

54. The next ingredient I will consider is identification of the appellant as the person who committed the offence.PW2 testified that when coming back from the butchery he noted that there was some movement inside the car. That he saw from the window somebody inside the car. That he saw a man with the child's under pant and trouser outside the motor vehicle. It was PW2'S evidence that he opened the car and found the accused having lowered his trouser to knee level.

55. Basically, in any criminal offence, the positive identification of a person is what connects them to that offence. It is therefore extremely important that any evidence on identification must be thoroughly and carefully scrutinized to avoid any miscarriage of justice. (See Mercy Chelangat -vs- Republic [2022] eKLR and which statement I find persuasive).

56. On the ground that the incident took place at night, thus the light used to identify the appellant was not analysed.

57. The trial court correctly noted that:

58. The accused person was not known to the complainant and neither was he known to the complainant's grandfather. However, the accused person was found in the vehicle in which the complainant had been left sleeping. He was restrained in the said vehicle until the time the police arrived and arrested him. He did not make it to escape. There was no possibility of being mistaken and there was no need of any special evidence on identification of the perpetrator.

59. I agree with the trial court reasoning. The appellant was positively identified even without considering the light used. I opine that the evidence of PW2 identifies the accused positively and that ground fails.

60. Having determined the issue as to identification, the other issue for determination is whether penetration was proved. In this respect, the evidence by PW1 was to the effect:

> " I was in the front seat and somebody came in the car and did tabia mbaya' he removed my clothes. He removed my trouser in was not wearing an underwear. He did tabia mbaya and it made me feel a lot of pain from my back."

61. The question is whether this evidence was sufficient to prove penetration?

62. Penetration is defined under Section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person. As an important ingredient of the offence, it must be proven beyond reasonable doubt and it can be proved either through the evidence of the child corroborated by medical evidence or in other circumstances, through the sole evidence of a child and this is governed by Section 124 of the *Evidence Act* Cap 80.

63. The said section 124 of the Act provides as thus;-

> Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be

liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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."

64. The question therefore is whether the trial court complied with this section?

65. PW3 testified that"

> "On emanation there were slight lacerations and inflammation of the anal tissues. Some wetness on the anal area is visible."
>
> Further PW3 stated that:
>
> On general physical examination. The child was dull and had difficulty in walking. I concluded that the act had occurred approximately 30 minutes before.

66. The evidence of PW1 was corroborated by the clinical officer. I am persuaded that penetration was proved.

67. I find therefore that the evidence tendered by the prosecution was sufficient to prove the elements of the offence the appellant was facing. Further the trial court was right in its determination and I have no reason to disturb it.

68. On whether the trial magistrate considered Section 333 (2) of the criminal Procedure Code pretrial detention period. The Appellant submitted that he was arrested on 15th August 2019 and he was presented in court on 16th August 2019 and he was thereafter found guilty and sentenced to serve 30 years on 9/2/2022. He submitted that the time he spent in custody was not considered during sentencing. I opine that the court should have considered the period as is provided under the Law.

69. I am guided by the court of Appeal decision in Ahamad Abolfathi Mohammed & Another –v- Republic [2018] eKLR, where the Court of Appeal held that: "The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by Section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

70. The same Court in Bethwel Wilson Kibor vs. Republic [2009] eKLR expressed itself as follows: "By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. "

71. On the ground that trial magistrate erred in both law and fact by rejecting the alibi defense without cogent reasons. No alibi defence was pleaded, he only testified that he was suspected to be a thief. There is no merit on this ground.

72. It is my view therefore that grounds 1 to 6 of the record of appeal fails. The conviction by the trial court was thus lawful and proper.

73. Taking into consideration all the above, I find that the appeal herein lacks merits. The only reprieve is on the sentence which I order that it will run from 15/8/2019 to take into account the period of the pre-trial detention.

On the other grounds, the appeal is dismissed.

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

L.W. GITARI

JUDGE