Cheruiyot v Republic (Criminal Appeal E029 of 2024)
[2024] KEHC 14398 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 14398 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

CRIMINAL APPEAL E029 OF 2024

JR KARANJA, J

OCTOBER 25, 2024

BETWEEN

ELVIS CHERUIYOT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arises from the decision of the Chief Magistrate at Kapsabet in SPMCC NO. 184 of 2019, in which the Appellant, Elvis Cheruiyot, was charged with defilement, Contrary to Section 8[1] as read with Section 8[4] of the *Sexual Offences Act*, for which he was convicted and sentenced to serve fifteen [15] years imprisonment.

2. It was alleged that on the night of 17/18th December 2019 at - Nandi County, the appellant defiled SJ, a girl child aged sixteen[16] years and in the alternative, he committed an indecent act with the child, Contrary to Section 11[1] of the *Sexual Offences Act*.

3. Being dissatisfied with the conviction and sentence, the Appellant preferred the present appeal on the basis of the grounds set out in the Petition of appeal dated 29th May 2024 in which he generally complains that the trial court erred in law and fact by convicting him on the basis of evidence which was insufficient and lacking in credibility.

4. The Appellant also complains that the trial court disregarded his defence and upon conviction, imposed upon him a sentence which was too harsh. He therefore prayed that the conviction be quashed and the sentence be set aside for him to be set at liberty.

5. At the hearing of the appeal, the Appellant appeared in person while the Learned Prosecution Counsel, Ms. Asiyo, appeared for the State/ Respondent and opposed the appeal which was heard by way of written submissions.

This court, considered the appeal, the supporting grounds and the rival submissions. Its role was to revisit the evidence and arrive at its own conclusions having in mind that the trial court had the benefit of seeing and hearing the witnesses. [See, *Okeno v Republic* [1972] EA 32]

6. In that regard, the evidence adduced against the Appellant through the prosecution witnesses [PW1 to PW7] was considered as against the Appellant's defence evidence and in the opinion of this court it was apparent that the fact that an act of defilement was committed against the child complainant [PW1] was not disputed and was indeed established and proved by complainant's credible evidence as corroborated by that of the Clinical Officer, Naomi Langat [PW7].

7. The birth certificate [P. Exhibit 1] produced by the Investigations Officer, PC Daniel Waiga [PW6], indicated that the Complainant was a minor aged approximately sixteen [16] years as at the material time of the offence and the report of the Clinical Officer's evidence was that the act of penetration was duly proved.

8. So, the finding by the trial court that the ingredients of age and penetration necessary to establish the act of defilement were duly established and proved was solidly correct and cannot be faulted by this court.

9. At most, the bone of contention was whether the Appellant was the person responsible for offending the Complainant and in that regard the trial court rendered itself, thus: -

> " Regarding the perpetrator, the Complainant stated that she was found in the house of the Accused. This position was corroborated by PW3, PW4 and PW5. The two were found not fully dressed. The Complainant was on the Accused Persons' bed. The Accused Person didn't counter that by giving a plausible explanation thereof."

10. This finding was informed by the evidence of the Complainant which indicated that the Appellant was not a stranger to her. That, he was in actual sense her boyfriend and that they engaged in sex on several occasions despite the fact that she was a minor which by itself was what actually landed the Appellant in trouble.

11. Although it was evident that the offending sexual escapade of the material date and other date were consensual and that the Complainant willfully participated in them, the Appellant could not escape from the trap that had been laid for him. He should have known better than to engage in sexual intercourse with minors.

12. Indeed, on the material date the Appellant was "caught with his pants down" while in a very compromising situation with the Complainant. The architects of the trap caught him "red-handed" with the Complainant. These were the Area Chief [PW3], a Village Elder [PW4] and a member of the area's "Nyumba kumi" group [PW5].

13. The defence by the Appellant that he did not defile the Complainant was clearly shattered and disproved by the very strong and credible evidence against him by the prosecution witnesses which "smoked" him out as the actual person who was responsible for offending the Complainant. His conviction by the trial court was therefore sound and safe.

14. With regard to the sentence of fifteen [15] years imprisonment, it was lawful and in accordance with Section 8[4] of the *Sexual Offences Act* which provides that: -

> " A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen."

15. This provision provides for a mandatory minimum sentence of fifteen years imprisonment and even if it is not considered to be mandatory due to the usage of the words "is liable upon conviction to imprisonment for.....", the sentence provided is nonetheless a minimum sentence of fifteen years imprisonment which the Appellant considers to be harsh and excessive due to the circumstances of the case and the Complainant's contribution to the commission of the offence.

16. The emerging jurisprudence on mandatory sentences or minimum sentences under the *Sexual Offences Act* and their constitutionality tend to favour the notion that such sentences are unconstitutional thereby granting discretion to the courts to interfere with them in order to abide by the circumstances of each particular case.

17. However, in this case the court would not apply the aforementioned notion and exercise discretion in favour of the Appellant for the simple reason that he did not in this appeal raise any issue on the constitutionality of Section 8[4] of the *Sexual Offences Act*.

Therefore, this court would have no reason to interfere with the sentence imposed by the trial court.

In sum, this appeal is dismissed in its entirety for want of merit.

DELIVERED AND DATED THIS 25TH DAY OF OCTOBER, 2024

J. R. KARANJAH,

JUDGE