Cheruiyot v Republic (Criminal Appeal 13 of 2019)
[2023] KEHC 17920 (KLR) (24 April 2023) (Judgment)

Neutral citation: [2023] KEHC 17920 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL 13 OF 2019

F GIKONYO, J

APRIL 24, 2023

BETWEEN

WESLEY KIPKEMOI CHERUIYOT .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the conviction and sentence of Hon. A. N. Sisenda (R.M) in Narok SOA No. 35 of 2018 on 22nd March 2019)

JUDGMENT

1. This appeal is against the appellant's conviction, and sentence of 25 years' imprisonment imposed on March 22, 2019 for the defilement of the complainant- a girl aged 13 years.
2. Being dissatisfied with the said sentence he filed this appeal through the memorandum of appeal dated 26/3/2019.
3. On November 23, 2021, the appellant sought leave to amend earlier grounds of appeal pursuant to provisions of Section 350 (2) (v) of the *CPC* as follows;
    1. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant a harsh and excessive sentence on in substantial prosecution side.
    2. That the learned trial magistrate erred in points of law and fact by holding that the case for the prosecution was proved against the appellant whereas penile penetration was not adequately proved.
    3. That the learned trial magistrate erred in points of law and fact by holding that the case from the prosecution was proved against the appellant whereas the age of the complainant was not properly ascertained to justify the charges or the sentence passed.

iv. That the learned trial magistrate erred in points of law and fact by holding that the medical evidence tendered was prove of defilement while on the face of evidence tendered, did not prove the complainant was defiled.

v. That the learned trial magistrate erred in points of law and fact by failing to realize that the whole prosecution case was riddled with material contradictions which were enough to displace the prosecution's narrative.

vi. That the appellant prays to be present during the hearing of this case.

vii. That the appellant prays to be provided with the original trial court records and its judgement to be able to adduce better grounds of appeal.

viii. That in any eventuality that the appeal does not succeed he begs this court to review his sentence in light of section 216 and 329, criminal procedure code cap. 75 as read with Francis Karioko Muruatetu & Another v r; petition no. 15 of 2015.

ix. That the learned trial magistrate erred in law and in fact by fully relying on the testimony of the complaint and ignoring the clear contradiction with the testimony of the other witnesses.

x. That learned trial magistrate erred in law and in fact in not properly evaluating the avoidance by the witnesses which were incongruent.

xi. That the learned trial magistrate erred in selectively impugning the prosecution's evidence and yet giving credence to the same evidence.

xii. That the learned trial magistrate misdirected herself in fact and law by not appreciating that the evidence of the prosecution didn't prove their case beyond reasonable doubt.

xiii. That section 8(3) of the *Sexual Offences Act* No. 3 of 2006 is unconstitutional under articles 159 and 160 of the *Constitution of Kenya* in that

    (a) it prescribes a minimum penalty that may be imposed for the offence,

    (b) the provisions of the section give the court partial, restricted and limited discretion in the sentencing process.

    (c) the provision provides a fixed minimum sentence thereby rendering the sentence as arbitrary, uncertain and incapable of being determined in law, and

    (d) it partially takes away the discretion of the court in the sentencing process.

Directions of the Court

4. The appeal was canvassed by way of written submissions.

Appellant's Submissions.

5. The appellant submitted that the sentence meted on him was harsh and excessive. That the trial court did not take into account that he was young and a first offender. That the trial court did not consider directing that a probation report be filed before the sentence. That the trial magistrate considered an extraneous factor of not being able to mitigate. Therefore, according to the appellant the sentence is inconsistent with the objectives of sentencing as provided under the sentencing policy guidelines. Thus, the sentence ought to be reviewed and a lenient one imposed.

6. The appellant submitted that penile penetration was not proved. That the trial magistrate did not mention why there was no spermatozoa. That in any circumstance, there was no aggravating circumstances of violence or force. According to the appellant the torn hymen and even bruises could be attributed to other factors.

7. The appellant submitted that there are gaps in the prosecution case. That the clothes were not picked for examination or presented to court as exhibits.

8. The appellant submitted that there are inconsistencies in the testimonies of the prosecution witnesses especially PW1 as against those of PW2, PW3 and other witnesses. The trial court did not attempt to reconcile those inconsistencies or consider them. To him, the said inconsistencies should be resolved in favour of the appellant.

9. The appellant submitted that ground 6 and 7 are spent and ground 8 is abandoned.

10. The appellant submitted that identification by recognition was not proper as the type of light used to identify was not particularized.it is the appellant's contention that important ingredients as far a identification and recognition of the attacker are concerned were left out and thus it was improper and irregular.

11. The appellant submitted that there seems to have been a relationship between PW3 and the appellant. That the witness had a desire to fix the appellant by framing him for her own selfish reasons.

12. The appellant submitted that the trial court sentenced him based on provisions of minimum sentence. That also he was in custody during trial.

13. The appellant relied on the following authorities;

    i. *Evans Wanjala Wanyonyi v Republic* [2019] eKLR

    ii. Article 50(2)(p) of the *Constitution*.

    iii. *JMM v Republic* [2021] eKLR.

    iv. *Benard Ndegwa Maina v Republic* [2020] eKLR

    v. *Arthur Mshila Manga v Republic* [2016] eKLR

    vi. *Mwamusi & Another v Republic* Cr. App. No. 226 Of 2002

    vii. *John Mutua Munyoki v Republic* [2017] eKLR

    viii. *Charles o. Maitanyi v R* Cr App No. 6[1986] K.C.A.

    ix. *Moses Monyua Mocheru v R* Cr App. No. 63 [1987] Ca

    x. *Wangombe Vs R*(1980) K.L.R

    xi. *Rahid Ruguze Roba v Republic* [2016] eKLR

    xii. *Muruatetu & Another v Republic; Katiba Institute & 4 Others (Amicus Curiae)* (Petition 15 & 16 Of 2015) [2021] KESC31 (KLR) (6 July 2021) (Directions)

    xiii. Crminal Appeal No. 84 of 2015; *Joshua Gichuki Mwangi Versus Republic*

The respondent's submissions.

14. The respondent submitted that age of the victim/complainant, penetration of the of the appellant's genitals into the victim's vagina and identity of the perpetrator was proved.

15. The respondent submitted that there were no contradictions nor inconsistencies and even if they were there, they are minor and did not go to the root of the prosecution case hence this court should ignore them. The minor inconsistencies (if any) were satisfactorily explained and that the record of appeal clearly reflects that prosecution witnesses were truthful.

16. The respondent submitted that history of the *Sexual Offences Act* and its passage by parliament was necessitated by the increase in sexual attacks against the vulnerable members of our society from children and also increasingly men who were becoming victims of sexual violence. Thus the question of minimum sentences comes in, which is to set baseline sentences for perpetrator of particular offences as may be prescribed by legislature in its wisdom.

17. The respondent relied on the following authorities;

    a. Section216, 329 and 379 of the *Criminal Procedure Code*.

    b. *David Njuguna Wairimu v Republic* (2010) eKLR

    c. Section, 2, 8(1) (3) of the *Sexual Offences Act*.

    d. *Kyalo Kioko v Republic* [2016] eKLR

    e. *Mark Oiruri Mose v Republic* [2013] eKLR

    f. *Michael Saa Wambua & Anor v Republic* [2017] eKLR

    g. The National Assembly Hansard of April 26, 2006 No. 3 Of 2016

    h. Article 21(3) ,94(1) (2) of the *Constitution*.

    i. *Moatshe v The State; Motshwari and Others v The State* (Criminal Appeal No. 26 Of 201; Criminal Appeal No. 2 Of 202) [2003] BWCA 20; [2004] 1 BLR 1(CA) (31 January 2003)

    j. *Joseph Muerithi Kanyita v R* (2017] eKLR

    k. *Kamaro Wanyingi v Republic* [2008] eKLR

    l. *Republic v Thomas Gilbert Cholmondeley* [2009]eKLR

    m. *S v Makwanyane* [1995] (3) SA391, Paragraph 46.

    n. *The State v Muller, Ivan Andries* Case No. 2 Sh98/2005 High Court of South Africa.

    o. *R v Jeremiah Koilel* [2021] eKLR

    p. *Sammy Abiyo Jiilo v Republic* [2021] eKLR

    q. *The State v Vasco Kangulu Libangani* [SA 68 of 2013] [2015] NASC 5

    r. *Republic v Elijah Munee Ndundu & Anor* [1978 eKLR

    s. *Zealand Case Of R v Radich* [1954] NZLR 86, 87

t. *S v Gakeinyatse*(CLCLB-092-08) BWCA 107

u. *S v Dodo* (CCY 1/01) [ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC)

v. Article 19 of the *Convetion On The Rights Of The Child*

w. *R v Ipeelee*

x. *Joshua Gichuki Mwangi v R* Court Of Appeal- Nyeri Crim. App. No. 84 Of 2015.

y. *Michael Katana Jefwa v R* Crim. App. No. 7 Of 2020

z. *Juma Abdalla v R* Crim. App. No. 44 Of 2019

Analysis and Determination.

Court's duty

18. As a first appellate court, this court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 32

19. I have considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. I find the main issues for determination are;

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

    ii. Whether the sentence was manifestly harsh and excessive

The charge and particulars

20. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

21. It was alleged that on 12th March 2018 in Narok North Sub-County within Narok county unlawfully and intentionally caused his penis to penetrate the Vagina of NW a child 13 years.

22. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

23. It was alleged that on 12th March 2018 in Narok North Sub-County within Narok county unlawfully and intentionally touched the vagina of NW a child 13 years.

Elements of offence of defilement

24. Section 8 (1) of the *Sexual Offences Act* establishes the offence of defilement as follows:

    " 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    8(3) A person who commits an offence of defilement with a child between the age of Twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

25. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    1) Age of the complainant;

    2) Proof of penetration in accordance with Section 2(1) of the *Sexual Offences Act*; and

    3) Positive identification of the assailant.

Age of the complainant

26. Age of the victim of defilement is essential element of the offence of defilement because; i) defilement is a sexual offence committed against a child- a person below the age of 18 years (*Children Act*); and ii) age of the child is an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence. See penalty clauses in *SOA*.

27. Was the victim proved to be a child?

28. The prosecution submitted that the age of the Complainant was conclusively proved. What does the evidence unveil?

29. The trial court conducted a voire dire examination of PW1 and came to the conclusion that she was possessed of sufficient intelligence to understand nature of oath and she testified on oath.

30. PW 1 told the court that she was 13 years old and was in class 7.

31. PW2- a grandmother to PW1 testified that PW1 was 13 years.

32. Age assessment was also carried out at Narok County Referral Hospital on 9th April 2018. It showed that she was approximately 13 years old. The age assessment report was produced as P Exh 3.

33. PW4- Hillary Kiptoo Benjamin Tum, a clinical officer produced the age assessment report.

34. Proof of age is not necessarily a certificate. Other evidence may be adduced to prove age (*Fappyton Mutuku Ngui vs. Republic* [2012] eKLR).

35. On the basis of evidence adduced by the prosecution, I find the victim's age was proved; she was 13 years at the time of the offence.

Penetration

36. The next hurdle; whether there was penetration.

37. Penetration, according to Section 2(1) of the *Sexual Offences Act* is:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

38. According to the Court of Appeal in *Mark Oiruri Mose v R* [2013] eKLR:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.".

39. The appellant submitted that the complainant's torn hymen and even bruises could be attributed to other factors.

40. The prosecution submitted that penetration was by the penis.

41. PW1 testified that the appellant approached her on 12/3/2018 at around 6: 30 a.m. she was going to school when she met the accused on the way. She recognized him as she had seen him several times since October 2017 when the appellant told her he wanted her to be his wife. The appellant got hold of her and covered her mouth. He also had a small knife which he used to threaten the complainant. He then spread a blue maasai shuka on the ground, proceeded to lay her on it and removed her shorts and panty. He then defiled her and ran away. She got up and went to school.

42. After school, she told her sister S about what had happened and S told her grandmother. She was taken to Narok referral hospital where she was treated and later to Narok police station to report the matter

43. The evidence of PW1 was corroborated by PW2. PW2 stated that she found the complainant had soaked one of her clothes which were bloody. She presumed they were her normal monthly period.

44. PW4, the clinical officer also testified that upon examination of the complainant, he found that her hymen was broken recently and she had bruises on her labias.

45. PW4 was very clear that penetration did occur.

46. The evidence by PW1 shows penetration was by sexual intercourse. Her evidence was corroborated by PW2 and 4. Therefore, these pieces of evidence which includes medical evidence confirms penetration of PW1 in the sense of the law. I accordingly find that the prosecution proved beyond reasonable doubt that there was a penetration of PW1- a child. But by whom?

Was the appellant the perpetrator?

47. The prosecution submitted that the identification of the appellant was through recognition.

48. PW1 confirmed knowing the appellant as she had seen him several times since October 2017. Both the complainant and the appellant lived in total area. PW1 testified that on the day she was defiled she identified the appellant and recognized him well because there were lights that had been switched on. PW2 testified that it is the minor who identified the appellant about 2 weeks after the incident when he passed by their home while riding a motor cycle and on that day of arrest, he was arrested with his motor cycle.

49. From the evidence that was adduced there was no possibility of mistaken identity. The appellant was well known to the complainant. She had seen him several times earlier.

50. The appellant in his defense introduced a defense- that he was owed money. He however did not call witness or adduced any evidence on the same. In any event the trial court considered the defense and the evidence of PW3 and made proper finding thereto.

51. I therefore find his defense does not hold sway.

52. The pieces of evidence analyzed herein prove that there was no mistaken identity of the appellant as the perpetrator of the offence in question. The evidence by the prosecution leaves no doubt that the appellant caused the penetration of the complainant.

53. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error.

54. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction, therefore, lacks merit and is hereby dismissed.

On Sentence

55. The appellant submitted that the learned trial magistrate convicted and sentenced him to 25 years' imprisonment without exercising discretion.

56. The trial court applied Section 8 (3) of the *Sexual Offences Act* to convict. The section provides:

    8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

Of mandatory or mandatory minimum sentence

57. I have always posed as food for thought; whether, except section 8(2) of the *Sexual Offences Act*, all the other penalty clauses in SOA which have adopted or used the phraseology liable upon conviction to imprisonment, prescribe a mandatory or mandatory minimum sentence as it is widely-albeit erroneously- believed.

58. I hold the view that, the erroneous belief arises from the incongruous use of the phrase 'liable upon conviction to imprisonment' together with 'not less than...'

59. Given the technical and legal meaning of the phraseology liable upon conviction to imprisonment' when used in penalty clause, these sections permit discretion.

60. It is not necessarily that the trial court believed only one sentence is prescribed in law; when she stated, thus: -

> 'The section of the Act that the accused is charged with is specific on the minimum sentence the accused person is liable to upon conviction. The accused in addition has indicated that he has nothing to say in mitigation. He seems not remorseful for his acts. The accused is therefore sentence to serve 25 years' imprisonment.

61. Although the trial magistrate stated that the penalty clause was specific on the minimum sentence, but after consideration of all factors and specific circumstances of the case- to wit, the accused offered no mitigation and was not remorseful for his act- she consciously imposed a sentence above minimum provided in the section. Such was a conscientious decision not fettered by anything except the circumstances of the case.

62. I take into account that the accused was a first offender. But the offence is serious and the manner and circumstances it was committed require real deterrent sentence. I do note that the girl was in school-in class 7 and aged 13 years. In these circumstances, a sentence of 25 years was not excessive. It is also of deterrent character and measure befitting these debauchery sexual attacks on children, yet, giving him an opportunity to be reintegrated back into society and be a productive citizen. I therefore see nothing upon which I may interfere with the sentence imposed of 25 years' imprisonment. Accordingly, I dismiss the appeal on sentence.

Of Section 333(2) CPC.

63. The appellant urged this court to take into consideration the time spent in custody prior to conviction.

64. I have perused the trial court record and found that the appellant was first arraigned in court on 9/4/2018. He remained in custody till 22/03/2019 when he was convicted and sentenced. In the circumstance, the sentence shall run from the date of his first arraignment.

Conclusion And Orders

65. The appeal on conviction and sentence is dismissed.

66. The sentence of 25 years imprisonment shall run from 9/4/2018.

67. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 24TH DAY OF APRIL, 2023.

....

F. GIKONYO M

JUDGE

In the presence of:

1. Korir for Appellant

2. Ms. Mwaniki for Respondent

3. Court Assistant – Mr. Kasaso