Cheruiyot v Republic (Criminal Appeal 11 of 2020)
[2023] KEHC 23023 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23023 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CRIMINAL APPEAL 11 OF 2020

JR KARANJA, J

SEPTEMBER 28, 2023

BETWEEN

ELIUD CHERUIYOT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, Eliud Cheruiyot appeared before the Resident Magistrate at Kericho charged with two counts of defilement Contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* with each count containing an alternative count of committing an indecent act, Contrary to Section 11 (1) of the *Sexual Offences Act*.

2. In Count One and Two, it was alleged that on the December 28, 2018 in Kipkelion West within Kericho County the Appellant intentionally caused his male sexual organ (penis) to penetrate the anus of JM, a child aged four (5) years and that of PM, a child aged four (4) years old. In the alternative, the appellant committed an indecent act of intentionally touching the anus of both the child victims.

3. After a full trial, the Appellant was convicted on both the main counts and sentenced to twenty five (25) years imprisonment on each count to run consecutively. Being dissatisfied with the conviction and sentence, the Appellant preferred the present Appeal on the basis of the grounds set out in his Petition of Appeal filed herein on February 3, 2020.

4. Basically, the Appellant complains that the trial court erred in both fact and law by convicting him without sufficient evidence and by failing to analyze and evaluate the evidence in its totality. Further that, the trial court erred by rejecting or disregarding his defence.

   At the hearing of the Appeal, the Appellant appeared in person and fully relied on his supporting grounds. He added that he was arrested for a different offence after trespassing into a house to shelter himself against the rain and contended that he was framed for no reason.

5. The Learned Prosecution Counsel, M/s Aseda, appeared for the state/respondent and opposed the Appeal by submitting that the Prosecution proved its case beyond reasonable doubt as the evidence against the Appellant was sufficient in proving the ages of the two Complaints and the fact that they were sodomized. That, the appellant was positively identified as was confirmed at an identification parade.

   On sentence, the Learned Prosecution Counsel submitted that the Appellant was sentenced to twenty five (25) years imprisonment for an offence which carries life imprisonment sentence.

6. Having considered the Appeal on the basis of the Supporting Grounds and those in opposition thereto as well as the rival submissions, the duty of this court was to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of hearing and seeing the witnesses.

7. In that regard, it was the prosecution case that the two complainants (PW 2 and PW 3) aged five and four years old respectively had on the material date been sent to the river by their mother FZ (PW 1) to fetch water. While there, they came across the Appellant who offered to assist them carry the water contained in jerrycans to their home, but on the way, he sexually molested them and sodomized both of them. Their mother later found them crying and upon enquiring, they told her that they had been sodomized. The mother confirmed as much.

8. The two complainants were taken to Hospital by their father, MV (PW 4). He also confirmed that the two had been defiled against the order of nature. He reported the matter to the Area Chief and to the Police. A Clinical Officer, Weldon Mitei (PW 5), examined the complainants at Kipkelion Sub County Hospital and compiled his findings in P 3 Forms (P Exh3 and 4) confirming that the two had been defiled against the order of nature ie sodomized.

9. Kennedy Wanjala (PW 7), then based at Kipkelion Police Station carried out necessary investigations and in the process gathered that the complainants could identify the person who offended them. With the help of the Area's Assistant Chief, the Appellant was arrested as the offender. He (PW 7) thereafter arranged for an identification parade which was carried out by Inspector Godfrey Obure (PW 6), the Deputy OCS (Officer Commanding Station) Fort Tenan.

10. The two Complainants identified the Appellant as the person who offended them. He was then arraigned in Court after completion of investigations.

    In his defence, the Appellant denied the charges and contended that he was arrested on charges that he was not aware of and confined in the Police Cells for three (3) Months. He indicated that the complainants were not known to him, neither did they know him.

11. After considering the evidence in its totality, the trial court, concluded that the prosecution had sufficiently proved that the material offence of defilement was committed by the appellant. He was then convicted accordingly.

    This court having re-evaluated the evidence opined that the facts of the case gave rise to two points of determination. Firstly, whether the complainants were actually defiled and secondly, whether the appellant was positively identified as the person who defiled them.

12. On the first issue, there was undisputed evidence that indeed the two complainants were defiled. Their testimonies in that regard was corroborated by that of their mother (PW 1) and father (PW 4) and most importantly, the Clinical Officer (PW 5).

    The ingredients of the offence of defilement were thus established and proved by the evidence availed by the Prosecution through the aforementioned witnesses.

13. The Appellant did not deny that the two complainants were actually defiled. However, he contended that he was not responsible for the offence as he was not known to the complainants, neither did they know him. He stated that he was arrested on charges he was not aware of thereby implying that he was the wrong person in the dock and was not responsible in any way for the offence. This brings us to the second issue for determination and according to the complainants (PW 2 and 3) their tormentor was a stranger to them but they each identified him facially and confirmed as such in an identification parade where both pointed him out as the culprit.

14. Both complainants indicated that it was possible to facially identify the appellant because the incident occurred in broad daylight at about 2.00 p.m. Indeed, such conditions were favourable for proper and positive identification of an offender. There was nothing to show that the complainants evidence of identification against the appellant was lacking in credibility.

    This court would also find that the appellant was positively identified as the person responsible for offending the complainants. His conviction by the trial court was therefore sound and safe.

15. On sentence, the complainants were aged below eleven (11) years. The applicable sentence was that provided under Section 8(2) of the *Sexual Offences Act* is mandatory terms. Thus, the appropriate sentence under the provision is life imprisonment.

    However, the trial court imposed a twenty five (25) years imprisonment sentence on both counts to run consecutively rather that concurrently.

16. In view of the emerging jurisprudence from our superior courts on mandatory sentences, it would follow that the sentence imposed herein by the trial court was lawful and reasonable in the circumstances. However, since the two counts arose from more or less similar facts, it would be proper and reasonable if the sentence were to run concurrently rather than consecutively. In that regard, it is hereby proclaimed and ordered that the sentences imposed by the trial court shall run concurrently.

    Otherwise, the Appeal is dismissed for want of merit.

    Ordered accordingly.

[DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER, 2023.]

J. R KARANJAH

JUDGE