Sigei v Republic (Criminal Appeal E039 of 2021)
[2023] KEHC 23103 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23103 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CRIMINAL APPEAL E039 OF 2021

JR KARANJA, J

SEPTEMBER 28, 2023

BETWEEN

KELVIN KIPRONO SIGEI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, Kelvin Kiprono Sigei, appeared before the resident magistrate at Kericho charged with gang rape contrary to Section 10 of the *Sexual Offences Act* and assault, causing actual bodily harm contrary to Section 251 of the penal code.

2. It was alleged in the first count that on January 1, 2021 within Kericho County with others not before court with common intention engaged in sexual intercourse with MC without her consent. Alternatively, they committed an indecent act against the said MC contrary to Section 11(A) of the *Sexual Offences Act*.

3. In the second count, it was alleged that on the January 1, 2021 within Kericho County with others not before court assaulted MC thereby occasioning her bodily harm.

4. Upon his plea of not guilty on all counts the appellant was tried, convicted and sentenced to seven (7) years imprisonment on the lesser offence of attempted rape and three (3) years imprisonment on the second count. Both sentences were to run concurrently.

   Being dissatisfied with the conviction and sentence the appellant preferred the present appeal on the basis of the grounds contained in his petition of appeal filed herein on December 17, 2021.

5. The appellant appeared in person at the hearing of the appeal and presented his written submissions which he fully relied on and urged the court to allow the appeal.

Appearing through the learned prosecution counsel, Ms Aseda, the state/respondent opposed the appeal on the basis of the arguments in its written submissions.

6. Upon due consideration of the appeal and its supporting grounds as well as the rival submissions it was incumbent upon this court as the first appellate court to revisit the evidence and draw its conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

   In that regard, the prosecution case was briefly that the complainant MC (PW1), a deaf and dumb person who testified through an intermediary was at the material time a form two student at [Particulars Withheld] Girls High School. On the material date at about 2.00pm she was alone washing clothes at a river when she was confronted by two men who held and pushed her to the ground, removed her skirt and tore her inner wear after which they proceeded to rape her before running away and disappearing. She had previously known the two men and recognized the appellant as one of them. She knew him as her neighbour.

7. JL (PW 2), was informed by the complainant that she (complainant) was assaulted and raped by the appellant and another. Being the mother of complainant, she (PW2) reported the matter to the area chief and to the police before taking the complainant to Litein mission hospital where she was examined.

   ECY (PW3), was at her home on the material date and time when the complainant whom she knew went there crying and saying that a man was chasing her. She (PW3) could not however, see any man but decided to escort the complainant to her home.

8. Kennedy Laboso (PW4) a clinical officer at Kapkatet sub-county hospital examined the complainant a few days after the incident and compiled the necessary medical report otherwise known as the P3 from (P.exhibit 1) in which he indicated that the complainant had a vaginal infection which could be due to attempted penetration. He however concluded that the complainant was not penetrated.

9. After the arrest of the appellant by a village elder/manager Weldon Langat (PW5), the police through PC Vivian Mbinya (PW6) investigated the matter and thereafter preferred the present charges against the appellant who denied the same and contended in his defence that he was not at home on the material date having travelled to Olenguruone to attend the burial of his uncle where he stayed for three days and upon his return home the mother of the complainant screamed and alleged that he had raped her daughter.

10. All the foregoing evidential facts were duly considered by the trial court which arrived at the conclusion that rather than gang rape the prosecution had established and proved the offence of attempted rape contrary to section 4 of the *Sexual Offences Act*. In doing so, the trial court invoked the provision of section 179 of the Criminal Procedure Act which provides under subsection (2) that: -

    > " where a person is charged with an offence and facts are proved which reduce it to a minor, offence, he may be convicted of the minor offence although he was not charged with it"

11. The trial court was of the view that the facts as proved by the prosecution established against the appellant the lesser or minor offence of attempted rape rather than rape or gang rape for which the appellant was charged in the first place. On the other offence of assault causing actual bodily harm, the trial court concluded that the offence was established and proved against the appellant.

12. In this court's opinion, although the complainant testified that she was assaulted and raped by the appellant and another, a fact denied by the appellant, the medical evidence by the clinical officer (PW

4) did corroborate the complaints evidence that she was assaulted. The result of the assault as per the medical evidence was the bodily harm occasioned to the complainant.

13. The unlawful act occurred in broad daylight. The identification of the appellant by the complainant as having been one of the two assailants was thus proper and free from the possibility of error or mistaken identity. Besides, the appellant was no stranger to the complainant, they were neighbours. His alibi that he was not at the scene at the material time was clearly disapproved by the complainant who placed him at the scene of the offence on the material date and time.

14. However, with regard to the offence of rape or gang rape for that matter, the same was disproved by the medical evidence of the clinical officer (PW4) when he testified that he did not see any spermatozoa after examining the complainant, neither did he find any evidence of penetration. The clinical officer thus disproved the fact that the complainant was raped or gang raped by the appellant and another.

15. The appellant's conviction on the second count of assault was thus proper and safe. His acquittal of the main offence of gang rape was proper but the same cannot be said with regard to the alternative count of committing an indecent act contrary to section 11A of the *Sexual Offences Act*. Indeed, the offence was clearly established on account of the complainant's evidence indicating that she was actually raped, a fact disputed by medical evidence which showed that there was no penetration of the appellant's sexual organ into her sexual organ, but clearly implied that the appellant caused his male sexual organ to come into contact with the complainant's female sexual organ. This was nothing short of an indecent act for which the appellant ought to have been convicted rather being acquitted.

16. It is the court's opinion that there being an alternative count to the main count of gang rape and which alternative count was factually established and proved by evidence availed through the complainant and the clinical officer there was no room for the application of section 179 (2) of the *Criminal Procedure Code* in this matter.

    In the circumstance, the acquittal of the appellant on the alternative count must be and is hereby set aside and substituted with a conviction on the same count. Otherwise, the conviction of the appellant on the second count of assault was proper and is hereby affirmed.

17. With regard to the sentenced imposed upon the appellant by the trial court with regard to the offence of attempted rape, it is hereby set aside and substituted for a sentence of three (3) years imprisonment on the alternative count of indecent act.

    The sentence of three (3) years imprisonment on the second count was lawful and reasonable and shall remain. Both sentences shall run concurrently.

18. It may be mentioned in conclusion that the appellant in his arguments contended that he ought to have been treated and sentenced as a child under the *Children Act* as he was aged seventeen (17) years old. Such contention was however, untenable on account of the medical evidence and the age assessment report which established that he was an adult aged eighteen (18) years old.

19. In sum, this appeal is dismissed on conviction and party allowed on sentence with the setting aside of the seven (7) years imprisonment for attempted rape and substitution thereof with three (3) years imprisonment for committing an indecent act.

    Ordered accordingly.

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

J. R KARANJAH

JUDGE