Sang v Republic (Criminal Appeal 47 of 2018)
[2022] KEHC 10226 (KLR) (21 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10226 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL 47 OF 2018

F GIKONYO, J

JUNE 21, 2022

BETWEEN

LEONARD KIPKOECH SANG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence of Hon. H. Ng'ang'a (S.R.M) in Narok SOA No. 6 of 2017 on 7h March 2018)

JUDGMENT

1. The trial court convicted the appellant and sentenced him to serve 20 years' imprisonment for defilement of a thirteen-year (13) old girl.

2. Being dissatisfied with the said sentence he preferred an appeal vide the memorandum of appeal received in court on March 15, 2018 setting out 6 grounds of appeal. On September 28, 2021, the appellant sought leave to amend the grounds of appeal pursuant to provisions of section 350 (2) (v) of the *CPC* as follows;

    i. That the learned trial magistrate erred in both matters of law and fact where he relied on the evidence of a single witness who proved to be untruthful and uncredible.

    ii. That the learned trial magistrate erred in both law and fact when he convicted the appellant yet failed to note that the age of the victims was not proved to the required standard.

    iii. That the learned trial magistrate erred in both matters of law and fact when he convicted the appellant yet penetration which is crucial element in the offence of defilement was not conclusively proved.

    iv. That the learned trial magistrate erred in both matters of law and fact when he convicted the appellant to serve 20 years imprisonment following the provisions of section 8(1) SOA

2006 yet failed to appreciate recent developments in the case of Francis Karioko Muruatetu which removed the fetters that binds learned judges and magistrates from following a statutory minimum mandatory sentence when sentencing the appellant.

v. That the learned trial magistrate erred in both law and fact by failing to give the appellant defence an open-minded analysis rather rejected it.

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

Appellant's Submissions.

4. The appellant's submissions are considered in detail in the analysis. I record also that the appellant relied on the following authorities;

i. Section 124 of the *Evidence Act*.

ii. *Saitoti Ole Ngoingoni V Republic* [2018] eKLR Cr App No 17 Of 2016.

iii. *David Ochieng Aketch V Republic* [2015] eKLR Hccr App No 30 Of 2015.

iv. *Kaingu Elias Kasomo V Republic* in Malindi Criminal Appeal No 504 Of 2010.

v. *Alfayo Gombe Okello V Republic* [2010] eKLR.

vi. *Dickson Oduor Adero Alias Dicky V Republic* Criminal Appeal 83 Of 2018.

vii. *Julius Kioko Kivuva V Republic* [2015] eKLR.

viii. *PKW V R*

ix. *Francis Muruatetu* Petition No 15 Of 2015.

x. *Guyu Jarso Guyo V Republic* 2018.

xi. *Geofrey Mutai V Republic* 2018.

xii. *Wilson Thirimbu Mwangu V Republic* [2017] eKLR.

xiii. *Kinyanjui V Rep* [2004] eKLR 364.

The respondent's submissions.

5. The respondent's submissions are also discussed in detail in the analysis by the court. I also record that the appellant relied on the following authorities;

i. *Evans Wamalwa Simiyu V Republic* [2016] eKLR.

ii. *Rua Ngao Mwatuma V Republic [*2014] eKLR.

iii. Section 124 of the *Evidence Act*.

iv. *Francis Karioko Muruatetu & Anor V Republic* Petition No 15 Of 2015.

v. *Ngao V Republic* (criminal appeal 5 Of 2020) [2021] KECA 154 (KLR) November 19, 2021.

vi. *Benard Kiproo V Republic* [2021] eKLR

vii. *Lawrence Muchina Ngugi V Republic* [2021] eKLR.

viii. Section 216 of the *criminal procedure code*.

Analysis And Determination.

Court's duty

6. As a first appellate court, the court will re-evaluate evidence with such judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Except I will bear 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

Issues

7. I have considered the grounds of appeal, 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 there was a grudge and whether the appellant's alibi defense was considered.

   iii. Whether PW1 was truthful in terms of section 124.

   iv. Whether the sentence was manifestly harsh and excessive

Elements of offence of defilement

8. The appellant submitted that ingredients of the offence were not proved as against the appellant. That the prosecution witnesses' testimony was not conclusive that PW1 was defiled.

9. 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* which provides:

> "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."

10. Accordingly, the specific elements of the offence of 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.

11. What does the evidence showeth?

Age of the complainant

12. The appellant submitted that the age of the victim was not conclusively proved.

13. The prosecution submitted that the age of the complainant was proved beyond reasonable doubt to be between 12 to 15 years.

14. On July 6, 2017, PW1 appeared in court to give her evidence. The court observed that she said she was 13 years hence the trial court did not see the need to subject her to voir dire examination.

15. PW1 was placed on the stand to testify. She stated that she was in class 4 at [particulars withheld] primary school and is 15 years old.

16. PW2-DKC, the father of PW1, told the court that PW1 was his first-born daughter and that she was born in the year 2003. He stated that she was 14 years and in class 4.

17. PW5- Benjamin tum, a clinical officer who examined the complainant on January 29, 2017 noted in the P3 form that the girl was aged 13 years. P3 form was produced as P Exh 1 a.

18. The trial court noted that the apparent age of the minor was 13-14 years.

19. The prosecution did not provide the minor's birth certificate or baptismal card or any other document.

20. However, proof of age does not mean only certificate. Other evidence, say of the victim, the parents or guardians, or medical evidence, may be adduced to prove the age of the child (Fappyton Mutuku Ngui v Republic [2012] eKLR, and Francis Omuroni v Uganda, criminal appeal No 2 of 2000)

21. A parent is better placed to know the age of a child. In this case, the father stated that PW1 was born in the year 2003. Therefore, in 2017 she was between 13-14 years.

22. From the testimony of PW1, PW2 and PW5 the complainant's age was between 12- 15 years.

23. On the basis of the evidence adduced, I find the age of the victim was 13 years old.

Penetration

24. The appellant submitted that penetration was not conclusively proved.

25. The prosecution submitted that the element of penetration has been proved beyond reasonable doubt.

26. Penetration is defined in section 2(1) of the *Sexual Offences Act* as:

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

27. Penetration was further described in the case of Mark Oiruri Mose v R [2013] eKLR where the Court of Appeal stated that:

> " 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." (Emphasis added).

28. PW1 in her testimony stated that on January 24, 2017 she had gone to the posho mill to grind maize when she met the appellant who deceived her and went with her to his house where she spent two nights. She stated that she slept with the appellant. He did to her tabia mbaya. He removed her clothes. She was wearing her school clothes. She was wearing a panty and a biker which the appellant removed. He then did tabia mbaya to her. She stated that she felt pain and bled. He did the same to her for two days.

29. It was PW1's evidence that she had sexual intercourse with the appellant for those two days that she stayed with him. After two days he took her to his grandmother's house in Chemanel but they stayed at a neighbours's house. She stated that while there they had sexual intercourse. Her father in company of M and AK came and rescued her, and she was taken to Megenyo while the appellant was taken to Ololunga police station. PW1 further stated that she received medical treatment at Ololunga hospital.

30. PW5 examined the victim. He noted that the hymen was broken but not fresh. There was no bleeding or discharge. He also noted absence of spermatozoa after conducting high vaginal swab. He produced P3 form filled on January 30, 2017, treatment notes, laboratory request form and results and pre rape care form as P Exh 1 a, 1b, 1c and 1d.

31. I should state here that it is not a requirement of the law that for penetration to be proved in defilement charges, spermatozoa must be present for; the attacker may not have completed the sexual activity to ejaculation; or the testing was done after some time. I do think also bathing may also affect the evidence, and that is why victims are supposed to be attended to immediately the assault happens in order to preserve evidence. See *Mark Oiruri Mose v R* [2013] eKLR

32. PW3 was, nevertheless very clear that penetration did occur.

33. The evidence of PW2, PW3- John Langat and PW4- Wilson Kirui who traced the victim found her at the residence of the appellant. The victim stated that for all those days she was missing she was in the house of the appellant and that they had sexual intercourse.

34. The trial court in its judgement noted that she was truthful and credible. The court relied on the proviso of section 124 if the *Evidence Act*.

35. On the basis, of the foregoing evidence an irresistible conclusion is that the appellant had sex with the child herein.

36. I accordingly find that the medical evidence as well as that by PW1, PW2, PW3 and PW4 proves there was penetration of the child. But by whom?

Was the appellant the perpetrator?

37. The prosecution submitted that the victim and the other prosecution witnesses were able to identify the appellant. In addition, during cross examination the appellant acknowledged that the victim was well known to him.

38. It was PW1's evidence that she stayed with the appellant for a period of two days where the appellant was defiling her. After two days the appellant took her to Chemanel to his grandmother's place. In those two days the victim was able to recognize the appellant as the attacker.

39. PW1's evidence was that she was in the company of the appellant is corroborated by the testimony of PW2, PW3, and PW4 that they found them together.

40. On cross examination, the appellant stated that the girl was called SJ and is his neighbour and confirmed she goes to school.

41. Therefore, there was no mistaken identity. Identification was by identification. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant.

    Whether the appellant's alibi defense was considered and whether there was a grudge.

42. The appellant submitted that the trial magistrate erred in law when he failed to give the appellant defence a fair, objective and open-minded analysis.

43. The prosecution submitted that the appellant's defence was made up of lies and cannot hold any water and like the tower of babel must be brought down. His defence did not shake the prosecution's evidence.

44. The appellant gave sworn evidence. It was his contention that he was going home from Olmagenyo towards Chemanel when he met the girl at Matocha. He stated that he had heard that she had run away from home. He found her in the company of a woman who begged him to use his phone. She called someone whom he did not know. Later the girl's father called him and police came and arrested him.

45. This chain of events was not raised by the appellant in cross examination of PW1 or any of the prosecution witnesses.

46. The appellant asked PW1 on cross examination whether she was in the company of Amos a male companion which PW1 denied.

47. The appellant further alleged that there was a land dispute between him and PW2. He admitted that he did not cross examine PW2 on the issue. PW2 in his evidence stated that he did not have any grudge with the appellant.

48. I have noted that the issues which was raised by the appellant in his defence were never raised during cross examination.

49. I do not find anything which show that there was a grudge between the complainant's father and the appellant. The defence is mere afterthought. I therefore find that the trial court considered the defense of the appellant. I dismiss this ground of appeal.

Whether PW1 was truthful in terms of Section 124.

50. The appellant submitted that PW1 was not a credible witness.

    Section 124 of the *Evidence Act* which provides as follows:

    "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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 offence, 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."

51. In sexual offences, corroboration of evidence by the victim is not a mandatory requirement as long as the Court believes the victim is telling the truth and records the reasons for believing the victim.

52. The complainant narrated to the court the events and how they occurred. She was categorical that the appellant removed her panty and biker and had carnal knowledge of her on diverse dates. Her evidence was cogent, gave a picturesque of the incident with such succinct details of the manner it happened and the identity of the assailant. The testimony of the complainant was corroborated by PW2, PW3 and PW4. The evidence leaves no doubt that the appellant caused penetration of her. I so find and hold.

53. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. 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 sentence imposed on him was excessive in nature and is a statutory minimum mandatory sentence.

56. The prosecution submitted that the sentence passed by the trial court does fit the crime and ought not to be interfered with. Pursuant to the directions issued by the supreme court on 6th July 2021 in the Francis Muruatetu case in paragraph 11. 14 and 15 the court has restricted the application of the Muruatetu principles only to cases of murder. They took the view that, recent decisions of the high court and the court of appeal have upheld the sentences set out in section 8 of the SOA as being legal sentences. According to them, there must be conformity in sentencing it cannot be when the law sets a minimum sentence it is said that the discretion of the court is taken away whereas the law sets out a maximum penalty. The prosecution stated that setting out a minimum sentence in section 8 in the SOA was a deliberate attempt by the legislature in expressing its disgust and curbing the appetites of pedophiles.

57. I note the trial court applied section 8 (3) of the *Sexual Offences Act* to sentence. 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."

58. The offence is serious. I take into account that the accused is first offender. It seems from the judgment of the trial court that the trial magistrate believed only one sentence is prescribed in law; life sentence and to which he condemned the accused. He stated, thus: -

'.... The offence attracts a minimum sentence. I sentence the accused to serve 20 years imprisonment."

59. In so far as the trial court felt it did not have, and did not exercise discretion in sentencing the appellant, there is lawful justification to inquire whether the sentence passed was appropriate sentence. I do note however that indeed this is a serious offence against a small girl of the age of 13 years which took away her innocence. He deceived such a young girl to satisfy his bodily desires and lusts. In addition, sexual offences ordinarily cause trauma to, and compromises the integrity of the victim as a human being. It is also such an offence with dire post traumatic consequences. In the circumstances, 20 years' imprisonment is not excessive but appropriate sentence. I see no reason of interfering with the sentence imposed by the trial court. His appeal on sentence fails.

Section 333(2) CPC.

60. I have perused the trial court record and found that the appellant was first arraigned in court on January 31, 2017. The sentence will run from the date he was first arraigned in court; January 31, 2017.

Conclusion and orders

61. The appellant is hereby sentenced to serve 20 years imprisonment.

62. The sentence will run from the January 31, 2017 when he was first arraigned in court.

63. It is so ordered.

64. Right appeal explained.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 21ST DAY OF JUNE 2022

F. GIKONYO M.

JUDGE

IN THE PRESENCE OF:

The appellant

Ms. Torosi for DPP

CA – Mr. Kasaso