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Inyaso v Republic (Criminal Appeal E023 of 2022) [2024] KEHC 1539 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1539 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

CRIMINAL APPEAL E023 OF 2022

JR KARANJA, J

FEBRUARY 13, 2024

BETWEEN

KENNEDY ALUSA INYASO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The charge Kennedy Alusa Inyaso (Appellant) faced when he appeared before this Senior Resident Magistrate at Kapsabet was that of defilement, Contrary to Section 8(1) read with Section 8(3) of the *Sexual Offences Act* and in the Alternative, Indecent Act, Contrary to Section 11 (1) of the *Act*.

2. It was alleged that on the 5th May 2013 at Kapngetuny Village, Kapsabet town within Nandi County, the Appellant defiled AN , a child aged fifteen (15) years old or that he committed an indecent act with her by coming into contact with her thighs using his male genital organ.

3. After pleading not guilty, the Appellant was tried, convicted and sentenced to serve twenty (20) years imprisonment on the main count of defilement.

   However, in an expression of his dissatisfaction with the conviction and sentence, the appellant preferred this appeal anchored on the grounds contained in the Petition of appeal filed herein on 15th June, 2023.

4. The Appellant's main complaint was on the sentence which he contended was a harsh mandatory sentence which was not deserved in the circumstances and for which his mitigation was not considered by the trial court.

   On conviction, the Appellant implied that the same was based on insufficient evidence falling below the required standard of proof. He contended that his alibi defence was erroneously disregarded by the trial court and prayed that this appeal be allowed for him to be set at liberty.

5. The state, as the Respondent, opposed the appeal on the basis of the arguments expressed in its written submissions filed herein by the office of the Director of Public Prosecution (ODPP) through the Learned Prosecution Counsel, Ms. Brenda Oduor, Senior Principal Prosecution Counsel (SPPC).

6. In a nutshell, the Respondent contended that the necessary ingredients of a charge of defilement were duly established and proved through the evidence of its six (6) witnesses which was credible, consistent and well corroborated. That the appellants defence did not shake the prosecution's case and was a sham.

   On sentence, the respondent contended that it was lawful and well within the provisions of Section 8(3) of the *Sexual offences Act*.

   The Respondent therefore urged this court to find the appeal lacking on merit dismiss it.

7. Being a first appeal, this court, as was held in *Okeno v Republic* (1)172) EA 32 and *Kiilu & Another v Republic* (2005) 1 KLR, was required to re-visit the evidence presented before the trial court and arrived at its own conclusion having in mind that the trial court had the benefit of seeing and hearing the witness.

8. Accordingly, the prosecution case was briefly that on the material date in the morning hours the child Complainant (PW1) was on her way home from church when she met the Appellant, a person known to her. He called and asked her to accompany him to his house where he forced her to remove her clothes and proceeded to defile her. Thereafter, he continued to keep her inside his house where he lived with another youngman up to the time she was rescued by the police.

9. The Complainant's mother EW (PW2) arrived home at 3:00pm on the material date and found the Complainant missing. She then made enquiries on her whereabouts through relatives but still could not find her. It was on the Monday that followed that she and her husband, WK (PW4), were informed through a phone call that the Complainant, had been traced at a specific place. They proceeded to the place and found police officers in a house together with the Complainant and the Appellant.

10. Betty Chelagat (PW3), was on duty at Kapsabet Police Station on the material date when the Appellant was taken there by her colleagues who found him with the Complainant in his house within Kapsabet town where they had gone to follow up on a report of theft made at the police station. The Complainant was also taken to the station and when she was interrogated she informed her (PW3) that she had been lured into the house of the Appellant where he defiled her.

11. PC Betty (PW3) commenced investigations of the case by issuing necessary P3 forms and referring both the Complainant and the Appellant to the Kapsabet District Hospital for necessary medical examination. She also obtained an immunization card (P. Exhibit 3) from the Complainant's mother which indicated that the Complainant was born on the 15th October 1997.

12. PC Richard Sikami (PW5), was among the police officers who were following up a theft report involving some Safaricom Cards when they arrested a suspect who led them to his accomplices. In the process, they arrived at a place near (Particulars withheld) factory in the neighbourhood of Kapsabet Health Centre where they found the Appellant in his house in the company of the Complainant. The two were arrested even as a search in the house led to the recovery of some of the stolen items.

13. The Complainant was medically examined by Danson Gichangi (PW6), a clinical officer at Kapsabet District Hospital who completed and signed the necessary P3 form (P. Exhibit 4) confirming that the Complainant was indeed defiled.

    The Appellant was accordingly charged after completion of the investigations.

14. The defence case was a denial by the Appellant of having committed the offence.

He indicated that on the 7th May 2013 he left Kapsabet town for home and on arrival prepared his supper after which he proceeded to sleep when at about 10:00pm he was awakened by a knock at the door. He opened the door only to be confronted by the police officers who forcefully gained entry into the house.

15. The police informed him that they were in search of some stolen airtime credit cards and had already arrested a suspect who implicated him (Appellant). He was therefore arrested and taken to Kapsabet Police Station from where he was referred to Kapsabet Hospital to be treated for an injury sustained by himself after being beaten. There was a girl at the police station with whom he was taken to hospital where he was told that he had defiled her.

16. The trial court considered the evidence in its totality and concluded that the charge had been proved against the Appellant beyond any reasonable doubt. In so doing, the trial court found that the prosecution witnesses were credible and that the Appellant's defence was not only evasive but also untruthful and an afterthought.

17. This court on its own consideration of the evidence was satisfied that there was sufficient and credible evidence from the prosecution establishing not only the material ingredients of the offence of defilement but also that the Appellant was the person responsible for the offence against the Child Complainant. Despite feigning ignorance, the Appellant was a person very well known to the Complainant and referred to her as his girlfriend at the time of his arrest by a team of police officers including PC Richard (PW5).

18. The Complainant narrated the circumstances under which she found herself in the house of the Appellant where he sexually assaulted her against her wish. She implied that the Appellant took advantage of her after she agreed to accompany him to his house upon his request. Her mother (PW2) produced an immunization card (P. Exhibit 3) indicating that she was born on 15th October 1997 thereby establishing that she was of the age of fifteen (15) years at the time of the offence.

19. The report (P. Exhibit 4) by the medical officer (PW6) confirmed that the Complainant was at the material time of the age of fifteen (15) years and that she had indeed been defiled. Her statement to the police and evidence in court indicated and strongly pointed to the Appellant as having been the offender. His defence indicating otherwise was disproved, discredited and rendered a mere afterthought.

20. For all the foregoing reasons, it would follow that the Appellant's grounds of appeal are unsustainable. In his oral submissions at the hearing of the appeal he readily admitted that the Complainant was very well known to him and that they were together at his house on the material date, a Sunday. He however, implied that the two did not engage in sexual intercourse as she was on her menses, a fact disproved by the Complainant and the medical evidence.

21. This appeal must therefore fail on conviction. The Appellant's conviction by the trial court was sound and proper and is hereby upheld.

    With regard to the sentence of twenty (20) years imprisonment imposed upon the Appellant by the trial court, it was lawful and in accordance with Section 8(3) of the *Sexual Offences Act* as the Complainant was aged fifteen (15) years old at the material time of the offence. The Appellant was a young adult aged eighteen (18) years old at the time as per the material P3 form (P. Exhibit 5).

22. The age difference between the two was only three (3) years but the Appellant ought to have know better than to engage in sexual intercourse with his minor "girlfriend" by failing to keep his trouser zip

up and await her to mature into his "class" of adulthood. As it were, "he ate the forbidden fruit before it became ripe" and for that he has remained in the gallous (jail) for the last eleven years or so.

23. If the provisions of Section 8(3) of the *Sexual Offences Act*, have to be strictly applied herein, then the Appellant may as well continue to remain in the gallows for the next nine or so years on account of the mandatory minimum sentence of twenty (20) years imprisonment provided therein regardless of the circumstances of the offence which may call for a lesser severe sentence.

    The Court of Appeal in *Dismas Wafula Kilwake v Republic* (2019) eKLR held that: -

    > " In appropriate cases therefore, the court freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand.
    >
    > On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event if arbitrary or unreasonable exercise of discretion in sentencing."

24. It is therefore the opinion of this court that the circumstances of this case called for a lesser sentence of imprisonment rather than the mandatory minimum sentence of twenty (20) years imprisonment imposed upon the Appellant by the trial court. In that regard this court does hereby set aside the twenty years imprisonment sentence and substitutes it for a sentence of twelve (12) years imprisonment from the date of the sentence i.e. 12th November 2013. It is only to that extent that the appeal succeeds.

    Ordered accordingly.

DELIVERED AND DATED THIS 13TH DAY OF FEBRUARY, 2024

J. R. KARANJAH,

JUDGE