Simiyu v Republic (Criminal Appeal E063 of 2023)
[2024] KEHC 1198 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1198 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E063 OF 2023

AC MRIMA, J

FEBRUARY 14, 2024

BETWEEN

RONALD WANJALA SIMIYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. S. K. Mutai (Senior Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 74 of 2022 delivered on 6 th July, 2023))

JUDGMENT

Introduction:

1. Ronald Wanjala Simiyu, the Appellant herein, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 24th day of March 2022 and 10th day of April 2022 at [Pa village within Trans-Nzoia County, the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of AW, a child aged 16 years old.

2. Alternatively, the Appellant was charged with Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in same place, the Appellant intentionally and unlawfully caused his penis to come into contact with the vagina of AW a child aged 16 years old.

3. When the Appellant was arraigned before Court, he pleaded not guilty.

4. After full trial, he was found guilty and convicted on the main charge. He was sentenced to 15 years' imprisonment.

The Appeal:

5. The Appellant was aggrieved by the conviction and sentence. In his Amended Petition of Appeal, he cited four grounds impugning the decision of the trial Court. He contended that the prosecution failed to discharge its burden of proof to the required standard in failing to prove penetration, failing to consider the plausible defence, failing to hold that the Appellant's rights to a fair trial were impugned and that the sentence did not take his mitigations into account.

6. In the premises, he prayed that the appeal be allowed, the conviction be quashed and the sentence be set aside and that he be set forthwith at liberty.

7. During the hearing of the appeal, the Appellant relied on his written submissions. He expounded on the grounds of appeal and referred to several decisions.

8. The Respondent on its part extensively submitted that the conviction was safe, that the sentence was fair and legal and urged this Court to dismiss the appeal. Several decisions were referred to as well.

Analysis:

9. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.

10. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.

11. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and identification of the assailant. However, a brief look at the prosecution's case is of importance.

12. The prosecution's case was fairly straight-forward. PW1 was the complainant, one A.W. On 24th March, 2022, PW1 left home to fetch some water, but did not return. Her mother, who testified as PW2, then reported the matter to the Muroki Police Post. She was advised to look for her and update the police accordingly. PW3 who was the father to PW1 also vouched PW1's disappearance from home.

13. On 10th April, 2022 PW2 found that her daughter was living with the Appellant at his home and immediately informed the police.

14. It was the investigating officer who testified as PW4 among other police officers and PW2 who proceeded to the home of the Appellant at around 4:00am where the Appellant and PW1 were found sleeping together. They were both arrested and PW1 taken to hospital.

15. It was PW1's testimony that she was married by the Appellant and lived together for one month. They also indulged in sex every other time. PW5, a Clinical officer from Saboti Sub-county Hospital conformed that PW1's vagina had whitish discharge and the hymen was perforated. It was deduced that there had been penile penetration. These findings were in line with PW1's testimony that she lived with the Appellant for a whole month and engaged in sex.

16. PW6, who was a Dental Doctor, assessed PW1's age to be 16 years old.

17. On his defence, the Appellant denied having been arrested with PW1 and alleged that he had been framed. He confirmed that there was no grudge between him and any of the family members of PW1 who were his neighbours.

18. The Appellant called a witness one Wycliffe Wangila who testified as DW2. He alleged that when he learnt of the arrest of the Appellant, he went to see him at the Saboti Police Station where he was asked for Kshs. 15,000/= by PW2.

19. It was the foregoing evidence that led to the impugned conviction and sentence.

20. The Court will now look at the elements of the offence of defilement in this case.

Age of the complainant:

21. There was no dispute on the age of PW1. It was settled by PW6 who produced an Age Assessment Report for PW1. The age was assessed at 16 years old.

22. The Report contained expert evidence. Having gone through the record, this Court does not see how the expert evidence was impugned. The report was of high probative value and this Court agrees with the trial Court that the age of the complainant in this matter was as contained in the said age assessment report.

23. Accordingly, the complainant was a child within the meaning ascribed to the term under Section 2 of the *Children's Act*.

Penetration:

24. Section 2(1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person." The provision also defines 'genital organ' to include the whole or part of male or female genital organs and for purposes of the *Sexual Offences Act* it also includes the anus.

25. This position was fortified in *Mark Oiruri Mose vs R* (2013) eKLR when the Court of Appeal stated thus: -

> .... 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).

26. Later, the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v. Republic* (2014) eKLR held as such on the aspect of penetration: -

> In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

27. The Appellant herein vehemently argued that the prosecution failed to establish penetration.

28. The evidence on penetration was given by the complainant and PW5, the Clinical Officer.

29. The trial Court analyzed the evidence of all the witnesses and found that the prosecution witnesses were truthful.

30. PW1 was quite candid in narrating the events as they occurred. She stated that she lived with the Appellant for a whole month and they used to engage in sexual intercourse.

31. PW5 corroborated the evidence on penetration. He produced the P3 Form for the complainant as well as the treatment notes. In examining PW1, it was PW5's evidence that the hymen was perforated and white discharge was present. He concluded that there had been a penile penetration into PW1's vagina.

32. This Court has carefully perused the P3 Form and the treatment notes which were produced as exhibits. The Court is satisfied that they are of sound probative values.

33. This Court, thus, finds no difficulty in affirming the position that penetration into the complainant's vagina was proved to the required standard.

Identity of the perpetrator:

34. The prosecution had to lastly positively identify the perpetrator of the offence.

35. Apart from PW1 confirming that she lived with the Appellant for a month and were arrested while sleeping together, PW2 also testified that when she was asked by the police to look for PW1 and report back, she managed to ascertain that indeed her daughter was living with the Appellant and informed the police.

36. The police laid ambush into the Appellant's home at 4:00am and found both the Appellant and PW1 sleeping together. They were both arrested.

37. The Appellant, however, denied having been arrested with PW1. He alleged that he had been framed.

38. In consideration of the evidence on record, it is easily discernible that the defence does not hold. There is ample and well corroborated evidence on how the Appellant and PW1 were arrested together.

39. The defence is, therefore, not holding and is for rejection more so given that DW2 did not even state why PW2 wanted Kshs. 15,000/= from him.

40. There was also the contention that the Appellant's rights to a fair trial were infringed. He alleged that he was arrested on 8th April 2022 and was arraigned before Court on 11th April 2022.

41. The contention seems not to aid the Appellant in any way. The reason being the 8th April 2022 was a Friday and the 11th April 2022 was the following Monday. The police acted within the calling under Article 49(1)(f) of *the Constitution*. The argument is dismissed.

42. The upshot of the foregoing is that the prosecution discharged its burden to the required standard of proof in proving that indeed the perpetrator of the heinous act against the poor young girl was none other than the Appellant.

Sentence:

43. The Appellant was sentenced to serve 15 years in prison. He was treated as a 1st offender. He maintained that he was framed.

44. The High Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the

discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

45. There is no evidence that the trial Court erred in sentencing. The sentence is legal and offence extremely serious.

46. Considering the foregoing, the circumstances of the offence as well as the period the Appellant was in custody during trial, this Court, finds the sentence to 15 years imprisonment to be reasonable. The sentence shall, however, start from the date the Appellant was charged, that is on 11th April, 2022.

47. In the end, the following final orders hereby issue: -

    a. The appeal on conviction is dismissed.

    b. The appeal on sentence is also dismissed save that the sentence to start running from the date the Appellant was charged, that is, on 11th April, 2022.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 14TH DAY OF FEBRUARY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Ronald Wanjala Simiyu, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.