Chepkwony v Republic (Criminal Appeal E070 of 2021)
[2024] KEHC 3448 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3448 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E070 OF 2021

RN NYAKUNDI, J

APRIL 11, 2024

BETWEEN

SIMON CHEPKWONY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. N. Wairimu in Eldoret Law courts Cr. S.O No. 2238 of 2015)

JUDGMENT

Representation:

Mr. Mark Mugun for the State

1. 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* No. 3 of 2006. The particulars of the offence were that on the 6th day of May, 2015 in Eldoret West District within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ to penetrate the genital organ of a child aged 10 years

2. Alternatively, he was charged with an offence of committing an Indecent Act with a child contrary to section 11(1) of the *sexual offences Act*. The particulars of the offences were more less the same.

3. The Appellant was acquitted on the main charge but convicted on the alternative charge and sentenced to serve 10 years imprisonment. He was aggrieved with both conviction and sentencing thus mounting the present appeal. The appeal is based on the amended grounds as follows:

    i. That the learned trial magistrate erred in Law and fact in convicting and sentencing the appellant for 10 years for the two counts of defilement and indecent act.

ii. That the learned trial magistrate misdirected himself on the essential ingredients of defilement contrary to section 8(1) (4) of the *Sexual Offences Act* No. 3 of 2006.

iii. That the learned trial magistrate erred i law and fact by failing to independently analyse and/or evaluate the defence evidence before drawing a conclusion as by law required.

iv. That the learned trial magistrate erred in law and fact by failing to evaluate that the prosecution failed to prove their case beyond reasonable doubt as required by law.

v. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without allowing him proper legal representation especially on sentencing given that the appellant is a first offender.

vi. That the learned trial magistrate erred in Law and fact by convicting and sentencing the appellant without due regard and consideration of the Appellant's evidence in his defence and his mitigation.

vii. That in whole, the conviction and sentence was against the weight of the evidence as the prosecution did not prove their case beyond reasonable doubt and the trial magistrate sentenced the appellant on a flawed procedure.

viii. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant by imposing a very harsh, improper and/or excessive sentence in the circumstances.

4. This being the first appellate court, I am mandated to re-evaluate and analyse the evidence adduced in the trial court afresh for me to come up with an independent conclusion. In doing so, I must bear in mind that, unlike the trial court, I did not have the opportunity of observing the demeanour of the witnesses as they testified. See Okeno vs. Republic [1972] E.A 32.

5. At the trial court, the prosecution called a total of three witnesses.

6. PW1 the complainant told the court that the accused person defiled her. That it was in the evening, during games, at 3:30 when she was writing her homework for English. The accused person called one of the complainant's friend and classmate by the name P. P came back crying and told the complainant that she was being called by Simon, the accused herein. She went to the office and found him there and there was nobody in the office but just the accused. That he was standing. He did not say anything but pulled up the complainant's uniform up to the chest, removed her panty, opened hi zip, removed his penis and put it in her vagina. He tried to push him away and he left her.

7. PW2 testified that she is a teacher and she was summoned by the headteacher who informed her that there was a report for defilement. She reached out to the complainant who told her that she had been defiled by the accused. She immediately called the village elder who advised her to take the complainant to hospital and report the issue to the police. She took the minor to Ziwa, then Moi teaching and referral hospital. They were issued with a P3 form which was marked as PMFI 1.

8. PW3 the complainant's mother testified that she was called by the school and informed that her daughter had been raped. The child was taken to hospital, a P3 form was filled and the case was reported at the police station.

9. From the above prosecution evidence, the trial court concluded that there was reason to believe the complainant but the element of penetration was not sufficiently proved. The accused person to this end was acquitted on the main charge under section215 of the Criminal Procedure Code.

10. Both parties filed submissions in support of their case.

Appellant's submissions

11. Before I highlight the appellant's submissions briefly, a glimpse of the said submissions reveals that the appellant operates under the assumption that the sentenced imposed was on the main charge. On the contrary, the record bears witness that the accused person was acquitted on the main charge and what the court is confronted with is the alternative charge. I shall therefore disregard the submissions advanced by the appellant to that end.

12. According to the appellant the prosecution highly relied on hearsay to build their case. The prosecution did not produce evidence that corroborated the testimonies of the witnesses. That the prosecution did not tender any investigation report or photograph, tangible object or materials. In sum, the appellant submitted that the prosecution failed to prove their case beyond reasonable doubt and that the trial court erred in finding that the accused person was guilty of defilement.

Respondent's submissions

13. The Respondent's counsel made its submissions on the second count. It was submitted for the respondent that the offence of indecent act with a child was proved beyond reasonable doubt. According to the Respondent, the following ingredients should be met: -

    i. Commission of an indecent act

    ii. Whether the complainant was a child as at the time of the commission of the offence

    iii. Identity of the accused.

14. The Respondent submitted on the said elements and concluded that the prosecution proved its case beyond reasonable doubt. That the evidence adduced by the three prosecution witnesses was credible, consistent and well corroborated. The Respondent's counsel urged this court to uphold the conviction.

15. On sentence, the respondent submitted that the 10 years sentence imposed by the trial court is sufficient and it is aimed at deterring the appellant and other members of the community from committing a similar offence.

FINDINGS AND DETERMINATION.

16. In determining this appeal this court shall satisfy itself that the alternative charge was established to the required standards. An indecent act has been defined in the Sexual Offence Act as an unlawful intentional act which causes-

    (a)Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

    (b)Exposure or display of any pornographic material to any person against his or her will.

17. The charge of an indecent act with a child under section 11(1) of the Sexual Offence Act attracts an imprisonment term for not less than 10 years.

18. I take note that the courts are no longer curtailed by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful. See JWA v Republic (2014) eKLR. The trial court in the instant case conducted a voire dire examination of PW1 and the court was satisfied that the Complainant was telling the truth. I am inclined to concur with the findings of the court on the second count.

19. Further, it was also confirmed that the victim was a child of tender years and a voire dire examination was conducted before the evidence was taken. The complainant was categorical that the appellant raped him and she knew him very well since he was her teacher.

20. Doubts were created by the prosecution as to whether there was penetration. Based on the evidence adduced and the testimony of the witnesses, I am of the considered view that the same is sufficient to convict the appellant on the alternative charge.

21. In the upshot, the conviction on the alternative charge is upheld and to this end, the appeal on conviction fails.

On sentence

22. The appellant in his grounds of appeal argued that the sentence meted should be quashed as he is not guilty. What is the appropriate sentence? Section 11(1) of the *Sexual Offences Act* in which the appellant was convicted provides:

> 11(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent with a child and is liable upon conviction to imprisonment for a term of not less than ten years.'

23. The sentence therefore prescribed for such an offence is a term not less that ten years. However, in the "Muruatetu Case", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to sentencing;

> "(a) age of the offender;
>
> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;
>
> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;
>
> (f) remorsefulness of the offender;
>
> (g) the possibility of reform and social re-adaption of the offender;
>
> (h) any other factor that the Court considers relevant."

24. In issuing out a reasonable sentence, The sentencing guidelines 2023 have captured the following objectives to be considered:-

    i. Retribution: to punish the offender for his/her criminal conduct in a just manner.

ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.

iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

v. Community protection: to protect the community by incapacitating the offender.

vi. Denunciation: to communicate the community's condemnation of the criminal conduct.

vii. Reconciliation: To mend the relationship between the offender, the victim and the community.

viii. Reintegration: To facilitate the re-entry of the offender into the society.

25. There trial court while sentencing the appellant, stated that mitigation was noted but still went ahead to issue a mandatory sentence of 10 years. In my considered view, and as I have stated over and again elsewhere the accused mitigation ought to count in sentencing. The objectives of sentencing should be equally considered in totality. In this regard, section 10 of the *Sexual Offences Act* gives room for the exercise of judicial discretion.

26. The 1st Principle on infliction or punishment in our penal system is preeminently a matter for the discretion of the trial court. the fact that courts should as far as possible on conviction of an offender have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition by the Appeals courts. It is such a discretion that permits the trial court to carry out a balancing Act of inquiry on the various parameters in which to individualize specific sentences to particular circumstances. What stands out in this case is the fact that there are no substantial and compelling circumstances to interfere with the sentence of the trial court.

27. The trial court while sentencing the appellant considered the appellant's mitigation but still issued a minimum sentence. In considering the objectives of sentencing in their totality and the circumstances of the case. The unfortunate thing is within the Principles of the court in Nelson v Republic (1970) KLR 552 and Benard Kimani Gacheru v R eKLR the power to review the impugned sentence lack merit. This is also the case even weighing the metrics on account of mitigation, aggravating factors and the objectives of sentencing. Notwithstanding that position taken by this court, Section 333(2) of the CPC shall apply to incorporate credit sentence for the period spent in pre-trial detention.

28. In the upshot, the appeal is dismissed in its entirety on conviction and sentence.

DATED AND SIGNED AT ELDORET THIS 11TH DAY OF APRIL, 2024

In the Presence of:

Mr.Mugun for the State

Appellant

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R. NYAKUNDI

JUDGE