Sitienei v Republic (Criminal Appeal 207 of 2019)
[2023] KEHC 968 (KLR) (10 February 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 207 OF 2019

RN NYAKUNDI, J

FEBRUARY 10, 2023

BETWEEN

EDWIN SITIENEI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment and Order of Honourable P Wasike (Senior Resident Magistrate) in Kapsabet Senior Principal Magistrate's Court Criminal Case No.3495 of 2016 delivered on 10th December, 2019)

JUDGMENT

Hon. Justice R. Nyakundi

Magut Kirigo & Co, Advocates for the Appellants

1. The Appellant herein was charged with the' offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence are that on the 14th day of November 2016 at [Particulars Withheld], Kapkoimet location within Nandi County, he intentionally and unlawfully caused his penis to penetrate the vagina of SJ, a child aged 12 years.

2. The Appellant pleaded not guilty to the offence and the matter proceeded to full trial. The prosecution elected to call six witnesses.

3. PW1 was one Mr Isaack Kipkorir, examined the complainant and produced the P3 form as evidence. He testified that the minor presented with blood stained underwear. Upon examining her genital area, he found that the complainant had bruises on the labia and the vagina, she had a broken hymen and in her urine there was presence of blood due to trauma. The pregnancy test was negative and there was no sperm found. He relied on the treatment

notes from Chepterwai Health Centre and testified that he did not give her PEP treatment as 72 hours had passed since the incident.

4. The trial court conducted a voir dire on the complainant and she testified as PW2. She testified that she was born on 12th June 2002 and produced her birth certificate as PMFI-3. it was her testimony that on 14th November 2016 she was going to her neighbours' for tuition at around 2pm. They finished the tuition at 5pm and while heading home alone she met the accused. She knew him as he usually visits her grandmother and is related to her grandfather. After a short conversation he pulled her and she tried to resist. He then pulled her into her house and threw her on top of his bed. He threatened to assault her if she cried. He then undressed her and undressed himself then put on the condom although she did not see him put on the condom. He opened her legs and she felt something penetrated her vagina. She felt pain and when she started crying he threatened to beat her. He proceeded for 20 minutes then left her and tied her with a rope. He came back after 10 minutes and did not speak to her.

5. The next day he defiled her again and after serially defiling her he returned her home. She returned home but did not go into the house. She then went to her uncles' home and spent the night there. On 17th she saw blood stains on her panty and informed her uncle that the accused had defiled her. In the morning she was beaten and told her parents what had happened. She was then taken to Chepterwai and then Kipkaren police post. She recorded her statement at the station.

6. PW3, IL, testified that she knew the complainant as she was her first-born daughter. She confirmed that she was born on 12th June 2002. On 14th November 2017 at about 2pm her daughter went for tuition and did not return. She searched for her with friends but could not trace her.

7. On 17th November she received information that she was seen at her uncle's house. She later on told them that on her way back from tuition the accused had defiled her over the entire period she was missing. She took her to the hospital then the police station where she recorded statements.

8. PW5, AL the father of the complainant testified that on the material date, upon returning home from work at 6pm he noticed that the complainant was not at home. They tried to locate her for two days to no avail. On 18th November 2016 she was found at her uncle's house and she told them that after she left tuition she met the Appellant who pulled her into his house and defiled her. He took her to Chepterwai and Kipkaren police post. They were issued with a P3 form which she filled and the report showed that she had been defiled.

9. PW6, PC Samwel Mgodo attached to Kipkaren police post testified that he is the current investigating officer and that he took over from PC Maurice Olal who was transferred. He briefed him that a defilement report was made for the complainant on 18th November 2016 at 3.34pm. the facts were that the complainant was heading home from tuition on 14th November 2016 when the Appellant pulled her and took her to his house where they spent the whole night. A p3 form was issued and the scene was visited and exhibits collected.

10. The complainant had the child health card that showed that she was 12 years old at the time of the incident. The accused was arrested by PC Maguan and charged accordingly.

11. The accused was placed on his defence and testified under oath that on 14th November 2016 he was harvesting maize until 1pm. He then left to shower and at 5pm he went to charge his mobile phone. He didn't get a charged so he went to charge at John Kibet Songole's place. He

stayed there until 11pm. The next day he woke up to go to the shamba to harvest maize. He then asked for people to assist him to harvest as he had a circumcision ceremony and he went to assist building of a house until 1pm. He then went home to remove the maize which they did until 4pm. He then left for home at 6pm and ate support with John. The next morning, he woke up to go harvest maize. He denied committing the offence.

12. DW2, John Kibet Songok testified that he was with the accused on the dates of 14th and 15th November 2016 at 6pm as he came to his home to charge the phone. He even made his phone camera and took photos with it.

13. DW3, Pamela Chepchoge, testified that they were harvesting maize on 11th to 14th November 2016 and she does not know what happened in the house. DW4, Reuben Sawe, testified that he has no knowledge of what transpired on 14th November 2016. DW5, Everlyne Chumba, testified that she was with the Appellant harvesting maize on 15th and 16th November 2016. She doesn't know what happened in the house. DW6, Kelvin Kipkirui testified that on 14th November 2016 he was at the home of John Songor where they sat until night. He was however not with the Appellant on the day of 14th November 2016.

14. Upon consideration of the testimonies of the witnesses and the evidence presented in court, the trial court found the accused person guilty of the offence of defilement and convicted him on the main charge. He was sentenced to 20 years' imprisonment.

15. Being dissatisfied with the conviction and sentence, the Appellant instituted the present appeal vide a petition of appeal filed on 22nd December 2019 on the following grounds;

    1. The Learned Magistrate erred in law and in fact by convicting the Appellant on flimsy and uncorroborated evidence.

    2. The Learned Magistrate erred in law and in fact by accepting wholesale the contradictory evidence of the Complainant (PW-2) and the other prosecution witnesses.

    3. The Learned Magistrate erred in law and in fact in finding that the Appellant had been properly identified on the basis of uncorroborated evidence of a minor.

    4. The Learned Magistrate erred in law and in fact in failing to treat with caution evidence of recognition bearing in mind that they were neighbours with the complainant hence the possibility of a set up was high.

    5. The Learned Magistrate erred in law and in fact by failing to consider the defence of alibi raised by the Appellant and by shifting the burden of proof to the Accused person.

    6. The Learned Magistrate erred in law and in fact by accepting the testimony of the prosecution witnesses that the minor was aged 12 years yet the documents presented clearly showed that she was aged 14 years.

    7. The Learned Magistrate erred in law and in fact by failing to consider the testimony of Defence witnesses particularly that the Appellant had been away from his house at the time of the incident.

    8. The Learned Magistrate erred in law and in fact in holding that there was no evidence of mistaken identity or ill-will between the families despite evidence to the contrary.

9. The Learned Magistrate erred in law and in fact in failing to take into account the fact that the blood on the clothes found on the minor might have been as a result of her being on her monthly periods at the time of the alleged incident.

10. The Learned Magistrate erred in law and in fact by seeking to justify the contradictions in PW-2's testimony as regards the time she reported the incident to the police.

11. The Learned Magistrate erred in law and fact and misdirected herself by shifting the burden of proof to the Appellant to prove his innocence and filling in the gaps and omissions in the prosecution's case thereby convicting the Appellant on the basis of perceived weaknesses of the defence case.

12. The Learned Magistrate erred in law by convicting the Appellant on the basis of flimsy, contradictory, speculative and insufficient evidence by prosecution witnesses which were inconsistent in material particulars thereby occasioning a miscarriage of justice.

13. The Learned Magistrate erred in law and in fact by failing to take into account the fact that no evidence of marks on the minor's hands were presented by PW-1 despite her claims that she was tied up for two days.

14. The Learned Magistrate erred in law and in fact in locking out a key defence witness, namely, the Appellant's wife despite pleas by the Appellant for more time to call her as a witness.

15. The Learned Magistrate erred in law and in fact in failing to take into account the fact that no explanation was given for the delay for four (4) days before the incident was reported.

16. The Learned Magistrate erred in law and in fact in finding that the Appellant was the perpetrator of the offence despite medical evidence to the contrary.

17. The Learned Magistrate erred in law in arriving at a wrong decision against the weight of the evidence on record.

18. The Learned Magistrate erred in law and in fact by holding that the prosecution had proved its case beyond reasonable doubt in spite of glaring evidence to the contrary.

19. The Learned Magistrate erred in law by meting out a sentence that was excessive in the circumstances despite the averment by the Prosecution that the Appellant was a first offender.

20. The Learned Magistrate erred in law by failing to act fairly and judiciously.

Appellant's Case

16. The Appellant was directed to file submissions within 21 days on 31st March 2022. There are no submissions on record for the Appellant.

Respondent's Case

17. The Respondent filed submissions on 25th May 2022. Learned counsel for the state submitted that the complainant stated that as she was coming from tuition heading home, she met the Appellant on the way. He was not, a stranger as he used to visit her grandmother and that he was relative to her grandfather. The Appellant led her to the two bedroomed house and defiled

her. Further, that the medical evidence corroborates PW2's evidence as the P3 form clearly indicated that the complainant had bruises on both labias with a bruised vaginal wall and a broken hymen. Counsel submitted that penetration was proved beyond reasonable doubt.

18. On identification, counsel submitted that the Appellant was not a stranger to the complainant. She had seen him severally as he used to visit her grandmother and he is also a relative to her grandfather. Secondly the incident took place from 14th November,2016 to 16th November,2016. The complainant had ample time to see and identify the Appellant and therefore there is no mistaken identity. The evidence tendered was consistent and well corroborated. The complainant gave a consistent narration to her mother (PW4) this was the same story that was given by the investigating officer (PW6) who got the information from the complainant. Although

19. The Respondent contended that the evidence tendered on alibi had glaring loopholes and was overshadowed by the prosecution's evidence that was weighty. It is clear and evident that this witnesses were not with the Appellant throughout the two (2) days. At some point the Appellant and witnesses clearly indicate that they parted ways for a while. All the defence witnesses failed to support the Appellant's alibi. The complainant indicates that she was accosted by the Appellant at 5.00 pm as she came from tuition.

20. The Appellant's allegation to the effect that evidence was fabricated amounts to misrepresentation/falsehood. The prosecution evidence squarely links him to the offence. Counsel urged the court to find that the appeal lacks merit and should be dismissed.

Analysis & Determination

21. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. See Okeno v Republic [1973] E.A. 32; Pandya vs. R (1957) EA 336, Ruwala vs. R (1957) EA 570.

22. Upon considering the petition of appeal and the submissions on record and the following issues arise for determination;

    a. Whether the prosecution proved its case to the required standard

    b. Whether the sentence was harsh and excessive

Whether the prosecution proved its case to the required standard

23. The elements of the offence of defilement as set out in the *sexual offences act* are;AgePenetrationIdentification

Whether the age of the complainant was proved

24. The complainant testified that she was born on 12th June 2002 which was confirmed by her mother PW4 and corroborated by the production of her health card. This was proved conclusively

Penetration

25. The complainant narrated the actions of the Appellant with regards to the act of defilement. The medical evidence produced as exhibit 2 was filled and produced by PW5, Evans Bor, a

clinical officer at Kabiyet Sub County hospital. The conclusion of the medical examination is that from the injuries sustained it was evident that there was penetration.

Identification

26. Identification of the Appellant was by recognition as he used to visit his grandparents. Further, he raised his alibi defence at the tail end of the case thus rendering it an afterthought and unsubstantiated.

27. The evidence of the witnesses was well corroborated and consistent. The three ingredients of the offence of defilement having been satisfied, I find that the offence was proved beyond reasonable doubt. The trial magistrate did not err in finding the Appellant guilty of the main count.

Whether the sentence was harsh or excessive in the circumstances

28. The general cluster of offences prescribed in the *sexual offences Act* though sometimes taken lightly by the perpetrators of such crimes they carry more weight in view of the threats, infringement and violation of human dignity provided for under Article 28 of *the constitution*: Thus "Every person has inherent dignity and the right to have that dignity respected and protected."

29. Looking at the submissions, by the appellant the imposition of the custodial sentence it is clear that he is aggrieved with the order and requires of this court to interfere with the decision. It is trite that the jurisdiction of the court to vary or set aside the sentence is limited to the extent of the principles illuminated by the court of Appeal in Benard Kimani Gacheru –vs – Republic (2002) eKLR restated that:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

31. The tyranny of discretion is the power donated to the courts with rules of latitude anchored within the law in deciding controversies. This tool is better described by the language of Mr. justice Marshall in the case of Osborn et al. v. The Bank of the United States (1824 U.S) 9 Wheat 738 and 866 is most frequently met with in this connection:

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a: discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge: always for the purposed of giving effect to the will of the legislature; or in other words to the will of the law."

32. These profound principles were initially stated in the case of Rex vs Wilkes (1770 K. B) Burr. 2527, 2539. Where the famous dictum held as follows that " Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule not by humour, it must not be arbitrary, vague and fanciful, but legal and regular."

33. This jurisprudence, though developed in Inter American system it is applicable to the Kenya Legal System as the wide range of powers coffered to the judges in making judicial pronouncement. It is pertinent to mention that an Appeal's Court in determining any controversy arising from the lower court should exercise its discretion in a judicious manner and not as a matter of cause to vary or interfere with the ruling of judgement. In the case at bar, I am being invited by the Appellant vary the custodial sentence of 20 years imprisonment. Therefore, this court has to exercise that judicial discretion keeping in view the recognized principles and factors discussed above.

34. It is now time to navigate the provisions of the law under which the Appellant was punished following the conviction in line with section 8(1) (3) of the sexual Offence Act

35. Section 8 of the *Sexual Offences Act* prescribes the punishment for defilement as follows;

    (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life

36. Relevant to this Appeal in sub section 3 which provides:

    > that a person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than 20 years.

37. In Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021 - Machakos) [2022] KEHC 13118 (KLR) and Petition No. 97 of 2021 – Edwin Wachira & 10 others vs Republic - Mombasa, the general disposition is that courts need not be bound by the mandatory minimum and maximum sentences set out in statute. The import of these decisions is that courts are allowed to use their discretion and determine the appropriate sentences. Sentencing demands in serious crimes of this nature against human dignity must be punished appropriately with a rider in mitigating circumstances must be taken into account so that punishment imposed fits the crime. The purpose of the impugned sentence is well illustrated in the judgement of the trial court. For those reasons, upon considering the circumstances of the case, the mitigation of the Appellant and the submissions of the parties I am satisfied that the trial magistrate exercised her discretion judiciously and find no reason to disturb the sentence.

38. The appeal as a consequence is hereby dismissed in its entirety.

DELIVERED DATED AND SIGNED AT ELDORET ON THIS 10TH DAY OF FEBRUARY 2023

Appellant present

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R. NYAKUNDI

JUDGE