Koko v Republic (Criminal Appeal 45 (E054) of 2021)
[2023] KEHC 19612 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19612 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 45 (E054) OF 2021

AC MRIMA, J

JULY 6, 2023

BETWEEN

DENNIS MUMELO KOKO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. V. Karanja (Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 254 (E027) of 2020 delivered on 24th June, 2021)

JUDGMENT

Introduction:

1. Dennis Mumelo Koko, the Appellant herein, was charged with the offence of Defilement contrary to section 8(1)(3) of the *Sexual Offences Act*. The particulars of the offence were that on October 26, 2018 at Kiminini Sub-County within Trans-Nzoia County, the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of FNM a child aged 15 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 touch the vagina of FNM a child aged 15 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 twenty years imprisonment.

The Appeal:

5. The appellant was aggrieved by the conviction and sentence. In his Petition of Appeal, he cited several grounds impugning the decision of the trial court. He contended that the prosecution failed to discharge its burden of proof to the required standard. He observed that the evidence of PW4 exonerated him from the charges. He accused the trial court of relying on inconclusive and unreliable evidence.

6. He also posited that he laid out a cogent defence that was improperly rejected. He lamented that the trial court failed to observe recent trends to mete out a lesser sentence.

7. 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.

8. During the hearing of the appeal, the appellant relied on his written submissions. He argued that the ingredient of penetration was not proved beyond reasonable down on account of the evidence of PW4. He cited several contradictions in the testimony of the complainant to arrive at the conclusion that he was improperly identified as the perpetrator of the offence.

9. He submitted that his unsworn testimony was credible since it cast doubt on the prosecution's case altogether.

10. On sentencing, he urged that the trial court ought to have discounted that he had been in remand for 12 months. Taking that into account against the recent jurisprudential pronouncements on sentencing sexual offences, the appellant prayed that that sentence be reviewed downwards.

11. He added that he was remorseful and laid several mitigating factors in his submissions.

12. The respondent on its part did not place its submissions on the Court record.

Analysis:

13. 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.

14. 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.

15. 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.

16. The Complainant who testified as PW1, one FNM, was born on May 5, 2003. She was a Form 2 student at (Particulars Withheld) School . A Certificate of Birth was produced in evidence to that end.

17. The Certificate confirmed that the Complainant was 15 years old at the time of the offence. To this extent, this court finds that the prosecution established to the required standard that the complainant was a child as defined in section 2 of the *Children's Act*.

18. Under the moonlight and streetlight, the Complainant was on October 26, 2018 heading home from night studies at her school when she met the appellant at around 9pm. She readily recognized the assailant as the appellant who was her neighbour and knew him over a long time.

19. The complainant was in the company of one CA(testified as PW5) and F (not testified) who were commanded by the Appellant to leave her alone. When they refused, the Appellant removed a panga that scared away PW5 and F .

20. PW5 testified that by then, he also used to live in the same home with the complainant and was a neighbour with the Appellant. He used to dutifully pick the complainant from school after night studies.

21. When PW5 and F were scared and ran away, PW5 called and informed PW2 AWM, the complainant's grandfather what had transpired.

22. PW5 was able to easily recognize the appellant as he knew him and had just seen him at the market as he went to pick the complainant.

23. PW2 and PW5 began looking for the complainant. They rushed to the home of the appellant, but, both the complainant and the appellant were not there. The appellant then disappeared from the village and was arrested 2 years later on account of an assault case.

24. Meanwhile, the appellant grabbed the complainant's hand. He threatened to cut her with the panga if she did not listen to him. He scuffled her to the bushes. He then asked her to remove her skirt and underwear and lie down. He then unzipped his short, removed his belt and pulled his short down. He then sexually assaulted her.

25. The incident would later be reported on October 27, 2018 at Sikhendu Police Station where PW3 No. xxxxxx PC(W) Eputo Angeline was assigned to investigate the matter. The officer collected the evidence and awaited to arrest the appellant who was by then at large.

26. Although dark, the exchanges the appellant had with PW5 sufficiently ascertained his identity at the point of forcefully accosting the complainant. He then whisked the complainant to a bush where he sexually assaulted her.

27. The complainant's evidence as laid out, graphically pointed the appellant as the offender of this heinous crime.

28. The appellant's defence did not assist him either. He simply denied committing the offence stating that he was arrested on October 7, 2020.

29. Going by the state of evidence, the identification of the appellant as the assailant cannot be in error. Both the complainant and PW5 knew the appellant quite well as their neighbour. PW5 had also seen him not long before the ordeal. Further, the Appellant talked to the complainant and PW5, thereby affirming further his identity.

30. With such a background, there can be no chances of mistaken identity on the assailant. Further, the appellant disappeared for 2 years immediately after the commission of the offence. In sum, the identification by recognition of the appellant as the assailant was not in error.

31. The following day, the complainant was taken to hospital. She was examined and treated. The treatment notes and a P3 Form were produced as exhibits.

32. The P3 form was filled by PW4 one Fredrick Kimosop a Clinical officer attached to Matisi Sub-County Hospital. He observed that the Complainant's external genitalia was normal. There were bruises on her right labia minora. Her hymen was torn. He concluded that there was evidence of sexual activity by way of penetration. The evidence of PW4 satisfies that the ingredient of penetration had been established in line with its definition under section 2 of the *Sexual Offences Act*.

33. The upshot of the above is that the prosecution discharged its burden to the required standard of proof. Consequently, this court finds that the appeal against the conviction lacks merit. It is hereby dismissed.

34. On sentence, the Appellant was sentenced to serve 20 years imprisonment. In his mitigation, the appellant was treated as a 1st offender. He stated that he was the breadwinner of his grandmother and brother thus prayed for leniency.

35. On Appeal, the appellant stated that he has been rehabilitated. Although he stated as much, he failed to attach any evidence to that end. He was also remorseful. There is, as well, evidence that the Appellant disappeared for a period of 2 years after committing the offence. He was only found out after he had been arrested for committing another offence; that of assault.

36. 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.

37. There is no evidence that the trial court erred in sentencing. The sentence is legal and offence extremely serious. Further, given that the appellant disappeared for such a long period, such can only work to his detriment.

38. Considering the foregoing, the circumstances of the offence as well as the period the appellant was in custody during trial, this court, nevertheless reviews the sentence to 15 years imprisonment. The sentence to start from the date the Appellant was charged, that is on October 19, 2020.

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

    a. The appeal on conviction is dismissed.

    b. The appeal on sentence is allowed to the extent that the sentence is reviewed to 15 years imprisonment. The sentence to start running from the date the Appellant was charged, that is, on October 19, 2020.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 6TH DAY OF JULY, 2023.

A. C. MRIMA

JUDGE

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

Dennis Mumelo Koko, the Appellant in person.

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

Regina/Chemutai – Court Assistants.