



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO 41 and 46 OF 2019

SILAS KHALIALI.....1ST APPELLANT

ISAAC WANYONYI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. L. N. Kiniale, PM, delivered on 9/4/2019 in the Principal Magistrate's Court at Sirisia in Criminal Case No. 47 of 2018, R v. Silas Khaliali and Isaac Wanyonyi)

JUDGEMENT

[Pursuant to section 201 (2) as read with section 200(1) (a) CPC]

1. The appellants have appealed against their conviction and sentence of ten years' imprisonment in respect of the offence of benefiting from child prostitution contrary to 15A of the Sexual Offences Act No. 3 of 2006.

2. Ms. Nyakibia, counsel for the respondent has supported the conviction but has left the issue of sentence to the court to decide.

3. In this court the 1st appellant has raised four grounds in his petition of appeal.

4. In this court the 2nd appellant has raised five grounds in his petition of appeal.

a. I will consider the appeal of each appeal separately.

5. Appeal of the 1st appellant-SILAS KHALIALI

6. In ground 1, the appellant has stated the unchallengeable fact that he did not plead guilty.

7. In ground 2, the appellant has faulted the trial court for convicting him on contradictory evidence of the prosecution witnesses. In his written submissions, the appellant has submitted that MM (initials of the complainant's name PW 1) testified that she met three people on her way back to school. In this regard, PM (initials of the name of the father of PW 1) her father (Pw 2) testified that the second appellant went to the home of Pw 1 to offer her a lift. This he submits is contradictory. The evidence of Pw 1 was that on the material day she fell ill while in school. As a result, she returned home and met her father there. The father took her to hospital. They then returned home after treatment. At around 1.00 pm she took a bath and put on her uniform and proceeded to school. On the way she met three boys namely one Collins, who is a neighbour, Isaiah (2nd appellant) who also is a neighbour and Silas (the 1st appellant), who is also a neighbour. All these three were seated beside the road. They asked her to board the motor cycle in particular, it is the second appellant who offered to take her to school. The second appellant did not ask for money. The second appellant was the one driving the motor cycle. The complainant and Collins boarded the motor cycle as pillion passengers, while the 1st appellant left on foot using a short cut.

8. Furthermore, I have perused the entire evidence of the complainant's father. He did not testify that the second appellant went to the home of the complainant's father to offer her a lift. It therefore follows that the submission of the appellant is not supported by evidence and is hereby dismissed for lacking in merit.

9. Furthermore, the appellant has in effect submitted that the complainant was not a credible witness. He has also submitted that she did not positively identify all the appellants because she only identified them by their single names, which single names are used to identify animals, cities, and market places. The evidence of the complainant was that all the appellants were her neighbours, whom she knew well.

Additionally, the offence was committed during broad day light in the afternoon. She was also with the appellants for a consideration time. In the circumstances, I find that the complainant positively identified all appellants. This submission lacks merit and is hereby dismissed.

10. The appellant also submitted that the clinical officer (Esther Wepkhulu, Pw 3) was not a credible witness due to contradictions in her evidence. The appellant has pointed out that Pw 3 testified that the hymen was missing and that there was a whitish discharge, while the cervix, labia minora, and labia majora were normal. This the appellant says contradicts her evidence since the complainant had already changed clothes and had also showered, and therefore it was not possible to have a discharge. The evidence of the clinical officer was that upon examination of the complainant, she found as follows. ***“She had no hymen and whitish discharge was seen. The cervix and labia minora and majora were normal. The absence of hymen and whitish discharge indicates she had engaged in sexual intercourse recently.”*** She then produced the P3 as exhibit 5. Thereafter she did age assessment using a dental formula and found her to be 15 years’ old, in respect of which she produced the report as exhibit 4.

11. I find from the evidence that the broken hymen and the whitish discharge had nothing to do with the complainant having showered herself. It therefore follows that this submission lacks merit and is here by dismissed.

12. The appellant has also submitted that the evidence of the investigating officer (NO. 111627 PC Meltah Josse Wellingham Pw 4) contradicts that of the complainant and her father. The appellant has not shown in his submissions the alleged contradictions. I have perused the evidence of Pw 4 and I find that there are no such contradictions. The submission that the evidence of Pw 1, Pw 2 and Pw 4 is fabricated is coming up for the first time in this appeal. The appellant did not put to Pw 1, Pw 2 and Pw 4 in cross examination that their evidence was fabricated. I therefore find that this submission is an afterthought and I hereby reject it.

13. This appellant gave sworn evidence and was cross examined. While under cross examination the appellant denied knowing Collins, the complainant and the second appellant. The appellant admitted that the father of the complainant (Pw 2) bought land from them in February 2018. This is a clear admission that the appellant knew the father of the complainant. The appellant testified that there is no dispute between himself and the complainant. It is therefore follows that there is no reason as to why the complainant would tell the court lies against him. Again the appellant also testified that her father could be using her against the appellant, although the latter has nothing against her. Similarly, there is no reason as to why the complainant would tell the court lies against the appellant. The appellant was clearly an incredible witness.

14. Is clear that the defence of the appellant was rightly rejected for being incredible.

15. As a first appeal court, I have re-assessed the entire evidence produced during trial. As a result, I find that the trial court had the advantage of hearing and seeing all the witnesses including the appellant testify before it. It believed the prosecution version of what happened and disbelieved the appellant’s version of what happened. I find that the findings of the trial court are supported by the evidence adduced. I therefore find that there is no basis of interfering with those findings.

16. I the premises, I find that the appeal of the first appellant against conviction fails and is hereby dismissed.

17. The appellant was sentence to ten years’ imprisonment, which he submits is manifestly harsh and excessive. In sentencing the appellant, the trial court found that it was bound to impose the minimum sentence of ten years’ imprisonment. In the absence of the prescribed minimum sentence that court was prepared to impose a sentence of five years’ imprisonment.

18. The mitigation of the appellant was that he was HIV positive. He also had a wife and an epileptic child and the other one was disabled. He then pleaded for lenience.

19. The court appears not to have been aware that by virtue of the decision in ***Francis Murutetu & Another v R [2017] EKLR***, it was not bound to impose the minimum sentence. In the circumstances, I am entitled to interfere with the sentence imposed, which I hereby quash. After taking into account the mitigating factors including the fact that the appellant has now been in custody for over a year I hereby impose a sentence of six years’ imprisonment which will begin to run from the date of this judgement.

Appeal of second appellant- ISAAC WANYONYI

20. Mr. Makokha, counsel for the appellant, in ground 1 has faulted the trial court for convicting the appellant on uncorroborated hearsay evidence. He has submitted that the evidence of Pw 1 and Pw 2 is contradictory. It was his submission that Pw 1 testified that she found her father at home, after being granted permission from school on 17/09/2018 to go and seek medical treatment. In this regard the evidence of Pw 2 is that he was on duty when he received a call from school informing him that his daughter was sick. He told the teacher to release her, who then went home and was treated and told to return to school.

21. There appears to be an apparent contradiction in the evidence of Pw 1 and Pw 2 as to who initiated the permission process from the school of Pw 1. The evidence of Pw 1 is that she was given permission to go home, in respect of which she identified exhibit 2, being the leave out sheet. She did not testify as to whether she asked to be allowed to go home for treatment. On this point she is silent. She only added that after being given leave the complainant proceeded home and met her father (Pw 2). Upon arriving at home Pw 2 asked her as to why she had gone home. She told him she was sick. Pw 2 then took her to hospital and was treated. Pw 2 in this regard testified that on 19/9/2018, while on duty, he received a report that he daughter was sick from teacher Hosea. Pw 2 told Hosea to release her. She then went home and was treated. I have re-evaluated this piece of evidence and I find that there is no contradiction. I find that it was Pw 2, who asked teacher Hosea that Pw 1 be released home for treatment. She was then given the leave sheet (exhibit 2).

22. Secondly, Mr Makokha submitted that Pw 2 was aware that Pw 1 was not in school on 19/9/2018, but did not do anything until 22/9/2018, when the school notified him that the daughter had reported to school. Pw 2 then went there to confirm. Additionally, counsel submitted that the evidence on record from Pw 1 shows that it was her mother that was informed by the school and yet Pw 2 states that that it

was himself who was notified. The evidence of Pw 1 is that after reporting to school 22/9/2018, it was herself who called the father and told him what had happened. Pw 1 told her father that she could not leave the house of Collins because Collins threatened to kill her if she left or raised an alarm. She also testified that it is the school deputy (teacher), who called her father and told him what had happened to Pw 1. The evidence of the father on this point is that on 22/9/2018, a teacher called him and told him that her daughter had just arrived in school. He added that on 19/9/2018 a teacher had informed him that her daughter was not in school. After re-assessing this piece of evidence as a first appeal court, my findings are as follows. The submission that Pw 1 is the one who testified that her mother was notified by the school is not supported by the evidence. This submission is therefore wrong, since it is not supported by the evidence. The evidence that the school notified the mother emanated from the investigating officer (NO. 111627 PC Meltah Josse Wellingham Pw 4). Pw 4 testified that when the complainant arrived in school, her mother was notified. I find the evidence of Pw 1 and Pw 4 is credible that it was the father who was notified and not the mother. The evidence of Pw 1 and Pw 2 is credible on this point, while that of Pw 4 is not. In the circumstances, I find no merit in this submission, which I hereby dismiss.

23. Counsel for the appellant also submitted that the prosecution failed to prove the ingredients of the offence charged, citing **Zamzam Mohamed Hassan v Republic [2015] EKLK**, in support of his submission. In that case the court (Dulu, J.) pronounced itself in respect of what the prosecution was required to prove. The court stated that: ***"In effect therefore though the charge is related to prostitution, the prosecution is not required to prove prostitution in the common sense of offering sex for material gain. The prosecution is however required to prove that the victim was a child. It is also required to prove a relation and influence over the child."***

24. In the instant case, the evidence of Pw 1 is that when they arrived in the house of Collins, the 1st appellant asked her to enter the house and when she entered the house, the 1st appellant and the second appellant entered the house. The second appellant then locked the house. The second appellant then told her that Collins has a lot of money and wanted her to be his girlfriend. The complainant refused. The second appellant asked her as to why she was refusing yet Collins loved her. The second appellant then left the house and Collins entered. Both appellants then locked the house from outside. Collins began to touch her breasts. Collins told her to accept him as his boyfriend. He then sat on her and demanded a kiss from her. Collins told her to cook. She complied. When all the appellants ate, they left them in the house. In the night, Collins locked the door and demanded to have sex with her. She refused. Collins then forcefully removed her from the living room to the bedroom, where he forcefully had sex with her. She stayed in that house for a week.

25. It is clear from the foregoing evidence that all the appellants influenced the complainant to have sex with Collins by taking her to the house of Collins and telling her to be the girlfriend of the said Collins. The evidence that they told her that Collins had a lot of money was to the same effect.

26. I find that the influence of the appellants over the complainant began when they used their position as familiar neighbours to the complainant and pretended to give her a lift to her school; when in actual fact their intention was to take her to the house of Collins for sexual purposes. The joint intention of the appellants was put in execution by Collins when he demanded to have sex with the complainant. Upon refusal by the complainant, Collins forcefully had sex with her. By virtue of the doctrine of common intention in terms of section 21 of the Penal Code (Cap 63) Laws of Kenya, the actions of one appellant are deemed to be the actions of the co-appellants. The evidence indicates that no appellant disassociated from the actions of the other. It is clear therefore that they had a common intention in executing a common purpose of procuring the complainant to have sex with Collins. See **Solomon Mungai & others v R [1965] EA 782**.

27. As regards the age of the complainant, the evidence of the clinical officer proved that she was 15 years old. Her birth notification indicates she was born on 05/04/2003 (exhibit 1). I find that there is ample evidence that the complainant was a minor at the material time.

28. I have independently re-assessed the entire evidence as I am required to do as a first appeal court. As a result, I find that the appellant was convicted on sound evidence. His appeals against conviction fails and is hereby dismissed.

29. In his mitigation in respect of sentence, the appellant stated that he had one child and that he was a farmer. He then pleaded for leniency. I have considered his mitigating and aggravating factors. I find that the sentence imposed was unwarranted. In the circumstances, the sentence imposed upon him is hereby quashed and in its place I hereby impose a sentence of six years' imprisonment which will begin to run from the date of this judgement.

Judgement signed and dated at Narok this 19th day of December, 2019

J. M. Bwonwong'a

Judge

19/12/2019

And

Judgement signed, dated and delivered in open court at Bungoma this 13th of day of February, 2020.

S. N. Riechi

Judge

13/2/2020