



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 208 OF 2013

BETWEEN

PETER KARANJA SIMON APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Eldoret, (G. W. Ngenye-Macharia, J.) dated 8/7/2013 in HCCR.A. NO. 92 OF 2012

JUDGMENT OF THE COURT

1. The appellant, Peter Karanja Simon, was charged with two offences before the Magistrates Court at Eldoret. The charge under the first count was for the offence of attempted defilement contrary to Section 9(1)(2) of the Sexual Offences Act. The charge under the second count was escape from lawful custody contrary to Section 123 of the Penal Code.
2. He was tried and convicted on both counts and sentenced to serve 10 years imprisonment for offence of attempted defilement.
3. On appeal, the High Court upheld the conviction for the offence of attempted defilement, but set aside the conviction for the offence of escape from lawful custody and substituted the same with a finding of guilt for the offence of attempted escape from lawful custody. For that, the High Court sentenced the appellant to serve one-year imprisonment. The High Court directed that the two sentences would run consecutively.
4. Dissatisfied, the appellant has lodged this second appeal to this Court.

Background

5. The facts as established by the trial court and the High Court are that on 4th December 2010, at about 8.00 p.m, PO (PW2), a 15-year-old girl at the time, was on her way home from church where she had gone for choir practice. She met a boy on the way. That boy, who later turned out to be the appellant, started trailing her. He got close to her and pulled her to an old building. There, he pulled PO's skirt up in a bid to defile her. She resisted and tried to push him away from her. She uttered a loud cry. Two police officers, including Corporal David Cheptarus (PW5), who were passing by responded and arrested the appellant as well as PO and took them to Moi's Bridge Police Station where they were booked into different cells. The following day, PO's

father (PW 3) traced her at the police station and secured her release.

6. On 5th December 2010 (wrongly indicated in the record as 25th December 2010) Police Constable Mohammed Rashid Sigomba (PW1) was at work at Moi's Bridge Police Station. While escorting prisoners, including the appellant to the toilets, the appellant attempted to escape. Police Constable Prisca Amojong (PW4) heard a distress call urging her to hold the appellant who wanted to run away. She ran after him and apprehended him.
7. In his defence, the appellant stated that on 4th December 2010 he was on his way home to Moi's Bridge from Eldoret when he met a police officer who arrested him. He went on to say that the complainant "*was also arrested*" though he was not with her. He asserted that there is a grudge between him and the police officer over a certain girl.
8. After reviewing the evidence, the trial court was satisfied that both offences were proved and convicted the appellant on both counts. His appeal to the High Court, as already indicated, was not successful hence the appeal to this Court.

The appeal and submissions

9. The appellant appeared before us in person. He tendered written submissions. He canvassed four complaints. The first is that the rank of the officer who prosecuted the case before the trial court was not indicated.
10. The second complaint is that he was denied the right to call witnesses by the trial court in violation of section 211(1) of the Criminal Procedure Code as well as Article 19(3)(b) of the Constitution.
11. The third complaint is that the High Court erred in directing the sentences under both counts to run consecutively. In his view, the court should have directed that the sentences run concurrently.
12. The fourth complaint is that the Judge failed to properly evaluate the evidence in that she mixed up the witnesses and thereby arrived at a wrong decision.
13. Mr. Z. G. Omwega, Assistant Deputy Public Prosecutor who appeared for the state, opposed the appeal. On the complaint that the rank of the prosecuting officer was not indicated, Mr. Omwega drew our attention to the record and indicated that on 19th January 2011, the record shows that the prosecutor was SP Manuni as was the case on 7th March 2011. Furthermore, an officer of any rank can prosecute.
14. On whether the appellant was denied an opportunity to call witnesses, counsel conceded that on 23rd August 2011, the appellant informed the court that he had two witnesses. However, at the conclusion of his testimony on 26th October 2011, the appellant closed the defence case and cannot now complain that he was denied an opportunity to call witnesses.
15. On whether the High Court evaluated the evidence, counsel submitted that the evidence was clear on what transpired on 4th and 5th December 2010 and the High Court properly discharged its duty of reviewing the evidence. According to him, it matters not whether the attempt by the appellant to defile the victim occurred in a bush or in a building.

Determination

16. We have considered the appeal and the submissions. Our mandate in a second appeal such as this is confined to questions of law by reason of Section 361(1) of the Criminal Procedure Code. [See **M'Riungu vs. R [1983] KLR455**]
17. The first issue we have to determine is whether the appellant was denied his right to call witnesses. The record shows that on 23rd August 2011, after the close of the prosecution case, the

trial court was satisfied that a case had been made out against the appellant sufficiently to require him to make a defence.

18. There is reference, in the record of proceedings of 23rd August 2011, to Section 211 of the Criminal Procedure Code after which the appellant is recorded to have indicated that he would give sworn testimony “*plus 2 witnesses.*” The defence hearing did not take place on that date. It was adjourned to 25th October 2011 when the appellant gave sworn testimony and was cross-examined. Immediately after the end of cross-examination by the prosecution, the appellant closed his case. He did not on that date indicate that he had witnesses to call, and neither did he request for an adjournment in order to call witnesses. In those circumstances, we think the trial court was entitled to proceed in the manner that it did, by scheduling a date for delivery of judgment. In our view therefore, this complaint is devoid of merit.
19. The next issue is whether the High Court discharged its duty on first appeal. In this regard, the appellant contended that had the High Court discharged its duty to evaluate the evidence, it should have appreciated that there was a disparity between the evidence of PW2 and that of PW5 as to whether the scene of alleged crime was a thicket or an old building.
20. In our view, the High Court was mindful of its duty and did discharge that duty. The learned Judge expressed herself thus:

“This being a first appeal, its duty is to look at the evidence adduced before the trial court afresh, re-evaluate and re-assess it and reach its own independent decisions on whether or not to uphold the conviction of the Appellant. The court has to bear in mind the fact that it did not see the witnesses as they testified and therefore it cannot be expected to make any findings as to the demeanour of the witness. The court is further mandated to consider the grounds of appeal put forward by the appellant - See KOECH & ANOTHER -VS- REPUBLIC (2004) 2 KLR and KINYANJUI -VS- REPUBLIC (2004) 2 KLR. 365 - 366.”

21. After reviewing the evidence, the Judge concluded that the disparity in the specification of the place the appellant was found does not negate the fact that he was found with the complainant attempting to defile her. We are in agreement with the High Court. The complainant stated that the appellant “*pulled me to an old building. He caught me and wanted to defile me.*” On the other hand PW5 stated, “*We heard some murmuring in a nearby thicket.*” We do not think the statements are necessarily inconsistent or that the difference is material. What is material, as the Judge correctly observed is that, the appellant was found and arrested when attempting to defile the complainant. We therefore reject that complaint.
22. As regards the complaint that the sentence imposed by the High Court for the offence of attempted escape from custody, which the court directed, should run consecutively is harsh, there is no suggestion that the sentence is illegal. Under Section 361(1)(a) severity of sentence is a matter of fact. We do not therefore have the mandate to interfere with a lawful sentence.
23. Finally there is the complaint that the rank of the officer who prosecuted the case before the trial court was not indicated. There is no merit in this complaint. There is no suggestion that the officers who prosecuted the trial were not duly authorized to do so under Section 85 of the Criminal Procedure Code.
24. For all the above reasons, this appeal is devoid of merit. It is dismissed in its entirety.

Orders accordingly.

Dated at Eldoret this 29th day of April, 2016

D. K. MARAGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR