Kipkoech v Republic (Criminal Appeal E023 of 2020)
[2024] KEHC 8075 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8075 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CRIMINAL APPEAL E023 OF 2020

JR KARANJA, J

JUNE 27, 2024

BETWEEN

WYCLIFFEE KIPKOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, Wycliffe Kipkoech, appeared before the Senior Resident Magistrate at Kericho charged with defilement, contrary to section 8(1) read with section 8(2) of the *sexual offence Act*, in that on the 29th July, 2017 at Kapkatunga village Londian –Kericho county he defiled Happiness Onserio, a child aged two (2) years.

2. Alternatively, the Appellant was charged with committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*, in that of 29th July, 2017 at Kapkatunga village Londiani-Kericho county, he committed an indecent act with Happiness Onserio, a child aged two (2) years.

3. After a full trial, the Appellant was convicted on the main count and sentenced to life imprisonment. Being aggrieved with the conviction and sentence, the Appellant preferred the present appeal on the basis of the grounds set out in the petition of appeal filed herein on 23rd December, 2020.

4. In general, the Appellant complains that the trial court erred both in law and fact by convicting him on the basis of the prosecution evidence which was insufficient, uncorroborated and based on speculations, assumptions and mere inferences the Appellant also complains that the sentence imposed upon him by the trial court was manifestly excessive in the circumstances of the case. He therefore prayed for this appeal to be allowed and he be set at liberty.

5. The hearing of the appeal was by written submissions which were filed on behalf of the Appellant by Mugumya & Co. Advocates. The state/Respondent opposed the appeal and filed its submission through the learned prosecution counsel , Mr. Anthony K. Ndungu.

6. This court's obligation upon consideration of the appeal, the supporting grounds, and the rival submissions was to revisit the evidence and draw its own conclusions having in mind that the trial court had the benefit of seeing and hearing the witnesses.

7. In that regard, the prosecution case was in summary that the child victim was born on 8th April, 2015 and was about two (2) years old at the material time of the offence said to have occurred on 29th July, 2017 when the child was left at home by her mother, Gladys Osoro (pw1), a casual laborer by occupation as she (mother) went to a river to fetch water.

8. Upon her return home, the mother (PW1) found the child a sleep on a seat. The child slept for a long period of time and refused to eat. On the following day, the child complained of stomach pains and when her mother examined her she noted that the child vagina was bloody. The mother informed the child complainant's father, Mark Osoro (PW2), a tea plucker at a local tea-estate.

9. In the process of being interrogated by her mother the child complainant mentioned one "Wiki" as having sexually assaulted her. The said "Wiki" was known to the child's parents as a next door neighbour and was identified as the accused/Appellant.

   The child was taken to Kericho district hospital where she was examined by a clinical officer, Philip Rotich (PW5), who thereafter complied a report (Exhibit 2) in which he confirmed that the child had been defiled.

10. The child's sibling Sharon Moraa (PW3) a class four (4) pupil at the time indicated that the child went to play with the Appellant when he called her. He later asked her (PW3) to take the child into the house to sleep. She (PW3) did as instructed but noted that the child did not want anyone to touch her. She) (PW3) did not know what had happened to the child and never saw anything being done to her.

11. The matter was reported to the police and after necessary investigation conducted by PC Sammy Sawe (PW4) of Chepseon police station and his colleague, one CPL Omondi, the Appellant was arrested and charged with the present offence. His defence was a denial. He indicated that on the material date he was at home when he was sent by his mother to go to a neighbours home to collect milk. Thereafter, upon his return home at Kapkatunga estate he found one Leonard Kipkurui waiting for him. He (Appellant) normally taught or coached Leonard to play a keyboard (piano).

12. After Leonard left the Appellant's house at 3.00 pm the Appellant said that he went to another neighbour called Mama Salome to bring milk. His mother was at work at the time. She was a tea plucker. He reached home at 7.00pm and slept after having his supper. He was arrested on 4th August, 2017 on suspicion of having defiled the child complainant. He denied the allegations against himself and indicated that the child victim was not known to him.

13. After having considered the evidence in its totality, the trial court concluded that the prosecution had proved its case against the Appellant as a result of which he was convicted and sentenced to life imprisonment.

    A consideration of the evidence by this court reveals that the fact that the offence occurred was not disputed and was in any event confirmed by the child's mother (PW1) as corroborated by the medical evidence adduced by the clinical officer (PW5) as well as that of the complainants father (PW2).

14. The only issue which arose for determination was whether the Appellant was the person responsible for the offence. The trial court's answer to the question was in the affirmative despite the defence put forward in that regard by the Appellant. Not only did the Appellant deny that he was responsible for the offence, he also denied having previously known the child victim. All these, against the proven and undisputed fact that the complainant's parents were next door neighbours to the Appellants family.

15. It was obvious that the Appellant was economical with the truth when he denied that the child complainant was not known to him. The child's mother (PW1) who was the first person to discover that something was wrong with the child on that material date was also the first to hear from the child that it was the Appellant who was responsible for her predicament. It became Apparent that contrary to what the Appellant indicated, the child knew him very well by his nickname "Wiki".

16. Other than the complainant child and her parents (PW1) and (PW2) the Appellant was also known by the child's sibling (PW3). The child was not called to the witness box to testify. Apparently, this was due to her tender age of two (2) years.

    The child's sibling (PW3) clearly indicated that on the material date of the offence the Appellant had actually called and beckoned the child to play with him. She (PW3) also indicated that later on the same day the Appellant had asked her to take the child to the house and put her to sleep. In the process, she (PW3) noted that the child did not want to be touched by anybody but she could not tell what happened to the child as she did not see anything.

17. The evidence by the child's parents (PW1) and (PW2) together with that of their daughter (PW3) had the effect of placing the Appellant at the scene of the offence at the material time and showing that most likely that not the Appellant was responsible for defiling the child complainant due to the fact that he was the last person with the child before it was discovered that the child had been sexually offended. This was sufficient and credible evidence of circumstances against himself. It was cogent indirect or circumstantial evidence which clearly disproved the Appellant's defence.

18. For reason foregoing, this court must find and does herein find, as did the trial court, that the person responsible for defiling the child complainant was no other than the Appellant herein. His conviction by the trial court was sound and proper and is hereby upheld thereby rendering all his grounds of appeal in that regard and the supporting submissions unsustainable.

19. On sentence, the trial court imposed the mandatory sentence under section 8(2) of the *Sexual Offence Act* i.e life imprisonment. The sentence was lawful but in view of the emerging jurisprudence on the constitutionality of the mandatory sentence, prescribed by statutes and the fact that the Appellant was a first offender who regretted the offence and deeply remorseful as per his one page written mitigation filed in court on 1st November, 2019, and also in view of the pre-sentence report filed by the probation officer on 19th September, 2019 which favoured a non-custodial sentence and showed that the Appellant was almost attaining adult-hood at the time he committed the offence, this court considers it just and fair to set aside the life imprisonment sentence imposed upon the Appellant by the trial court for substitution with a less severe sentence.

20. In that regard, the sentence imposed by the trial court is hereby set aside and substituted for a sentence of ten (10) years imprisonment. Otherwise, the appeal is lacking in merit on conviction and is hereby dismissed.

21. Ordered accordingly.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 27TH JUNE, 2024

J.R. KARANJAH

JUDGE

In the presence of;

Mr. Keletyen holding brief for Mr. Kipngetich for Appellant and Mr. Ogutu learned prosecution case for the state.