Kirui v Republic (Criminal Appeal E029 of 2022)
[2024] KEHC 7668 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7668 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CRIMINAL APPEAL E029 OF 2022

JR KARANJA, J

JUNE 27, 2024

BETWEEN

EDWIN KIPKOECH KIRUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant Edwin Kikoech Kirui appeared before the Senior Resident Magistrate at Kericho facing a charge of defilement, contrary to section 8(1) as read with section (2) of the *Sexual Offences Act*.

2. It was alleged that on the 25th March,, 2021 at Sigowet sub county within Kericho county the Appellant defiled a girl aged ten (10) years old referred to as M.G. or that he committed as indecent act with her.

   After pleading not guilty to all the charges, the Appellant was tried, convicted and sentenced to thirty (30) years imprisonment on the main count.

3. Being dissatisfied with the conviction and sentence the Appellant filed the present appeal on the basis of the grounds set out in the petition of appeal in which he generally complains that he was convicted on the basis of the prosecution evidence which was insufficient, uncorroborated and manipulated. That, his defence was plausible but was disregarded by the trial court. He therefore prayed for the appeal to be allowed and for the conviction to be quashed. He also prayed for the sentence to be set aside and that he be set at liberty.

4. The hearing of the appeal was by written submissions with the Appellant filing his written submissions through W.K Ngenoh Lessan Advocates. The Respondent's submissions in opposition to the appeal were filed by learned prosecution Counsel, Anthony K. Ndungu. All the submissions were duly considered against the grounds of the appeal and those in opposition thereto. This court duty was to reconsider the evidence and draw its way conclusions bearing in mind that the trial court heard the benefit of hearing and seeing the witnesses.

5. In that regard, the prosecution's case was briefly that the child complainant (PW1) was at the material time a class four pupil at a local primary school. She lived with her mother, BC (PW2) and was familiar with the Appellant who was her neighbour. On the material date at about 7.00 pm, the complainant was heading home after collecting some milk when she met the Appellant who then engaged her in a conversation. In the process, the Appellant suggested having sexual intercourse with her. They were at the time along a foot path and after declining the Appellant's suggestion, the complaint's mouth was covered with the Appellants to prevent her from screaming. She was then forcefully defiled by the Appellant on the side of the footpath. Thereafter, the Appellant offered Ksh. 200/= to the complainant but she denied. She ran to her home and reported the incident to her parents.

6. The complainant's mother (PW2) received the report and passed it over to the complaint's father but they did not do anything on that date until the following day when they proceeded to the Appellants home before taking the complainant for treatment at a nearby hospital and reporting the matter at Sondu Police Station. The complainant was taken to Sigowet sub county hospital where she was examined and treated by a clinical officer, Hillary Cheruiyot (PW3), who compiled the necessary medical report on form p3 (P Exhibit 2) confirming defilement of the complainant.

7. The matter was investigated by Sgt. Rose Mukangai (PW4) who gathered that the complainant had been set to pick some milk when she met the Appellant who tricked and promised her some money before defiling her. That, the complainant was then about ten (10) years old having been born on the 9th June, 2010. On completion of the police investigations the Appellant was charged with the present offence.

8. The defence case was a denial and at indication that the Appellant was at his home alone on the material date when he prepared a meal of posho (Ugali) and vegetables. After having the meal, he retired to bed at 8.00 pm and slept upto the following day when he met the complainant father who told him that the complainant had been defiled. The information was unknown to the Appellant but was eventually referred to the police by the complainant's father.

9. The Appellant contend that he did not defile the complainant and maintained that he was in his home on the material day of the offence. That, the home was far away from the scene of the offence.

   Samuel Kipkemoi Bett (DW2). A neighbour and brother of the Appellant indicated that the Appellant was at his own home on the material date and time. Their mother Ruth Langat (DW3) contended that the complainant and her family lied about this case as demonstrated by their conflicting statement which indicated firstly, that the Appellant had not committed the offence and secondly that he Appellant had actually committed the offence.

10. Winnie Rono (DW4), an aunt of the Appellant, also indicated that the Appellant was at his home on the material date and time. All the foregoing evidence was duly considered by the trial court which thereafter arrived at the conclusion that the complainant had been defiled and that the person responsible for the offence was the Appellant.

11. In concluding a much, the trial court rendered itself as follows;-

> " Though the accused person in unsworn statements claimed committing the offence and even called witnesses to support his defence, the court having observed the demeanor of the alleged victim during her testimony in court and the prosecution witnesses being very credible and corroborating each other in their respective testimonies being guided by the provisions of section 124 *Evidence Act*,. I found the alleged victim to be a credible and a firm

witness and the court did not in any way question her credibility and the court believed her that it is the accused person herein who defiled her"

12. The trial court went further to state that;-

> " The court having duly considered the accused's defence, I found the same to be mere denials and after thoughts to fit into the case. The said defence did not affect the credibility of the prosecution case in any way."

This court, having reconsidered the evidence forms the opinion that the occurrence of the offence was not a disputed factor and that the only bone of contention was the Appellant's alleged responsibility for the offence.

13. The basic ingredients for the offence of defilement are firstly, the age of the victim and secondly, the fact of penetration. With regard to those ingredients, there was the evidence of the child complainant (PW1) which showed that she was actually defiled on the material date. There was also the evidence of the clinical officer (PW3) which corroborated the complainant evidence of defilement. The medical P3 form (P.Exhibit 2) duly indicated that there was penetration of the complaint's sexual organ with a male sexual organ.

14. Since there was a complaint that the complainant had been defiled and a medical examination on her a few hours after the fact revealed as much, it did not matter whether the hymen was broken during the offence or had previously been broken on account of similar previous act. Evidence of a previous broken hymen only servers to show that the victim was sexually active prior to the act complained of, but such evidence cannot by itself their disprove the fact of penetration at any one time.

15. Besides, a victim's previous sexual activities would not be alicence for any man to sexually assault her in any manner let alone defilement.

In the present case, there was sufficient evidence from the complainant (PW1) the clinical officer (PW3) to stablish and prove the fact of defilement. The findings of the trial court in that regard were therefore correct and are herein sustained.

16. The sexual assault against the complainant (PW1) translated to defilement by dint of the fact that she was a minor, an underage girl at the material time of the offence. This was confirmed by the evidence of her mother (PW2) who indicated that she was born On 9th June, 2010 and confirmed as much by producing the necessary child health card (P.Exhibit 1). This therefore placed the complainant at the age of about ten (10) years as at the material time of the offence.

17. The major dispute in this matter was on the identification of the Appellant as the person responsible for defiling the complainant. In that regard, the Appellant denied responsibility and attempted to raise an alibi that he was at his home on the material date and time of the offence. He implied that his home was nowhere near the scene of the offence. He called his relatives (DW 2,3 and 4) to confirm his alibi. However, the complainant evidence placed him at the scene of the offence on the material date and time thereby displacing and disposing his alibi.

18. Most importantly, there was no dispute that the complainant and the Appellant were not strangers. They were neighbours and knew each other well before the material date of the offence. The possibility of the Appellant having been mistakenly identified was remote. Besides, the trial court found the evidence of the complainant and indeed the rest of the prosecution witnesses to be credible in not only proving the occurrence of the offence but also the identification of the Appellants as the offender. This was the more reason why the Appellant was convicted.

19. This court does not see any reason to interfere with the findings of the trial court based on the credibly of witness. After all, the trial court was in a better position to make such findings because it saw and heard the witnesses. This is an advantage not available to an Appellate court.

    It's also the finding of this court that the Appellant was properly identified as the person who defiled the complainant. Consequently, the Appellant's conviction by the trial court was lawful, proper and is hereby affirmed.

20. With regard to the sentence the punishment provision of the law was section 8(2) of the Sexual Offence Act, which provides for a mandatory sentenced of life imprisonment. The trial court imposed a sentence of thirty years (30) imprisonment obviously taking cue the emerging jurisprudence on the constitutionally of mandatory sentence prescribed by statutes.

    The sentence was lawful, but in this courts opinion rather excessive regard being given to the Appellant's mitigation and the fact that he was a first offender.

21. It may also be noted that the complainant was apparently a sexual active individual her age notwithstanding and it was highly likely that on the material date of the offence she may have been a willing participant but because things may have gone wrong somewhere she decided to let "the cat out of the bag" and ended up incriminating the Appellant, hook, line and sinker.

    The sentence of thirty (30) years imprisonment is therefore set aside by this court and substituted for a sentence of ten (10) years imprisonment.

22. In sum, other that the alteration in the sentence, the appeal is dismissed for want of merit.

J.R. KARANJA

JUDGE

DATED AND DELIVERED THIS 27TH DAY OF JUNE, 2024.

J.R. KARANJA

JUDGE

In presence of;

Mr. Ogutu for state

Mr. Ngeno for Appellant

Mr. Kibet court assistant.