Langat v Republic (Criminal Appeal E008 of 2022)
[2024] KEHC 9768 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEHC 9768 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E008 OF 2022

RL KORIR, J

JUNE 26, 2024

BETWEEN

RICHARD LANGAT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number E006 of 2022 by Hon. Kibelion K. in the Principal Magistrate's Court at Bomet)

JUDGMENT

1. Richard Langat (now Appellant) was tried by Hon. K. Kibelion, Principal Magistrate for the offence of defilement contrary to Section 8 (1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on 7th January 2022 within Bomet County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of BC, a child aged 14 years.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 7th January 2022 within Bomet County, he intentionally and unlawfully touched the vagina of BC, a child aged 14 years with his penis.

3. The Accused/Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called four (4) witnesses in support of its case.

4. At the close of the prosecution case, the trial court ruled that a *prima facie* case had been established against the Appellant and he was put on his defence.

5. At the conclusion of the trial, the Appellant was convicted and sentenced to serve twenty (20) years in prison.

6. Being dissatisfied with the Judgment dated 22nd February 2023, Richard Langat appealed against the trial court's conviction and sentence on the following grounds reproduced verbatim:-

   i. That, I pleaded not guilty at the trial and I still maintain the same.

   ii. That the trial Magistrate erred in the law and facts by failing to realize that the Prosecution witnesses' evidence was not sufficient for a *prima facie* case to be established against me the Appellant.

   iii. That the 3 ingredients of defilement, penetration, identity of the perpetrator and age of the complainant was not proved beyond reasonable doubt.

   iv. That my right to a fair trial was violated contrary to Article 50(2) of the *Constitution*.

   v. That the Prosecution case was marred with contradictions, inconsistencies, discrepancies and glaring gaps.

   vi. That the present case was shoddily investigated.

   vii. That the medical evidence exonerated me the Appellant from the present case.

   viii. That my alibi defence was overlooked by the trial Magistrate hence there was no proper consideration.

   ix. That the mandatory minimum sentence meted on me is unconstitutional, lacks court's discretion and lacks the element of Article 28 of the *Constitution*.

7. This being the first appellate court, I am conscious of the duty to re-evaluate the evidence given at the trial court. See *Pandya v Republic* (1957) EA 336.

The Prosecution's Case.

8. It was the Prosecution's case that the Appellant defiled B.C (PW1) on 7th January 2022. PW1 testified that on the material day, the Appellant dragged her to his house, undressed her and inserted his male genital organ to her female genital organ. That she then went to school and reported the ordeal to her teacher.

9. Geoffrey Cheruiyot Kirui (PW4) who was the clinical officer at Bomet Health Centre testified that upon examining PW1 he found bruises and lacerations on her labia minora and majora. That there was no visible discharge, no infection and no spermatozoa noted. PW4 concluded that there was evidence of penetration.

The Appellant's Case.

10. The Appellant, Richard Langat denied committing the offence. He stated that he had a disagreement with the victim's mother (PW2) as he had refused to marry the victim (PW1). That PW2 kept on telling him that she would do something bad to him.

11. It was the Appellant's case that he was assaulted under PW2's instructions and when he went to make a report at the Police Station he was apprehended and the police officers took away his Kshs 10,000/=. That the people who assaulted him paid the investigating officer to cover up the offence of assault. It was his further case that he was taken to Chelimo Hospital for treatment of the injuries.

12. The Appellant stated that the victim (PW1) was examined and nothing was found.

13. On 30th May 2024, I directed that this appeal be dispensed off by way of written submissions.

The Appellant's submissions

14. The Appellant submitted that the Prosecution did not prove the age of PW1 beyond reasonable doubt. That PW1 and PW2 testified that PW1 was born in the year 2010 but when the investigating officer (PW3) took PW1 for age assessment, it was established that PW1 was aged 14 years old. Further that PW1 did not produce a birth certificate to prove her age.

15. It was the Appellant's submission that PW1 was an untrustworthy witness and her testimony was full of contradictions. That if PW1 was defiled, why did she wait for seven days to report that she had been defiled. It was his further submission that PW1 should have reported the occurrence of the offence to her mother.

16. The Appellant submitted that he had a disagreement with the victim's mother as he had declined to marry the victim. He further submitted that he did not commit the offence.

17. It was the Appellant's submission that the circumstances of this case did not call for a mandatory minimum sentence. That this court should exercise its discretion and reduce his sentence.

The Prosecution's/Respondent's submissions.

18. The Respondent submitted that the victim was aged 14 years at the time of the commission of the offence. That an age assessment report (P.Exh 3) was produced as evidence and further that the Appellant did not challenge the age of the victim.

19. It was the Respondent's submission that there was no doubt that PW1 had been defiled. That the victim's oral account was clear that penetration had been established. It was the Respondent's further submission that medical evidence lend credence to the victim's testimony.

20. The Respondent submitted that the identity of the Appellant was not in doubt. That the victim and the Appellant were neighbours and attended the same church together. The Respondent further submitted that the victim recognised the Appellant during the sexual attack.

21. It was the Respondent's submission that the Appellant failed to raise the issue of the grudge between him and PW2 and it was therefore an afterthought. That when the Appellant was interrogated by the investigating officer, he admitted to committing the offence and attributed it to the devil. The Respondent urged this court to reject the Appellant's defence.

22. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal filed on 14th March 2023, the Appellant's undated written submissions and the Respondent's written submissions dated 4th December 2023. The following issues arise for my determination:-

    i. Whether the Appellant was granted a fair trial.

    ii. Whether the Prosecution proved its case beyond reasonable doubt.

    iii. Whether the Defence placed doubt on the Prosecution case.

    iv. Whether the Sentence preferred against the Appellant was harsh and severe.

i. Whether the Appellant was granted a fair trial

23. It was a ground of the Appeal that the Appellant's rights to a fair trial as envisioned by Article 50(2) of the *Constitution* were violated. The Appellant did not specify how his rights were infringed upon.

24. I have gone through the proceedings and I have noted that the Appellant procedurally took plea on 14th January 2022, was supplied with the Prosecution's witness statements, cross examined the Prosecution's witnesses and thereafter presented his defence.

25. It is my finding that the trial court properly and procedurally conducted the trial proceedings and I accordingly dismiss this ground of Appeal.

ii. Whether the Prosecution proved its case beyond reasonable doubt.

26. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.

27. Rule 4 of the *Sexual Offences Rules* of Court 2014 provides that:-

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

28. The victim (PW1) stated during *voir dire* examination that she was born in the year 2010. This was corroborated by her mother (PW2) who testified that her daughter (PW1) was born in the year 2010. Geoffrey Cheruiyot Kirui (PW4) who was the clinical officer produced an Age Assessment Report as P.Exh 3. I have looked at the Age Assessment Report and it indicates that the victim was aged 14 years.

29. The court is faced with two conflicting ages of PW1. According to the Age Assessment Report, PW1 was aged 14 years at the time the offence was committed and according to the victim and her mother, she was aged 12 years at the time the offence was committed. Courts have held that in the absence of documentary evidence, a mother or a parent would be best placed to know the age of their child. In *E K v Republic* (2018) eKLR, the court held:-

> " The best evidence in relation to age of a person is a Birth Certificate. In absence of it, the parents would know, more so the mother....."

30. In this case, the age assessment report was documentary evidence arrived at after a scientific process of age assessment. I am persuaded that the age of the victim was 14 years old. In so finding, I am conscious that both ages 12 and 14 attract the same penalty and no party would in the circumstances be unduly prejudiced.

31. With regard to the issue of identification, the Court of Appeal in the case of *Cleophas Wamunga v Republic*(1989) eKLR expressed itself as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger....."

32. The victim (PW1) testified that he knew the Appellant as his neighbour as they lived in the same plot. The victim's mother (PW2) corroborated this testimony and further stated that after she learned of the commission of the offence, she reported the same to their landlord.

33. FC (PW2) testified that the Appellant admitted to defiling PW1 on the material day. No 240843 PC Beatrice Chesang (PW3) who was the investigating officer stated that upon interrogating the Appellant, the Appellant admitted to committing the offence but blamed it on the devil. PW3 reiterated the same evidence when she was cross examined by the Appellant.

34. When the Appellant testified, he stated that the victim's mother (PW2) had a grudge with him because he refused to marry PW1. Clearly, these were people who were well known to each other.

35. From the evidence above, it is clear to me that this was more of recognition that identification. The Appellant, PW1 and PW2 all knew each other by virtue of being neighbours and their constant interactions. I have no reason to disbelieve or doubt the Appellant was identified by the victim (PW1) as the perpetrator of the offence.

36. Flowing from the above, I am satisfied that the Appellant was positively identified by the victim (PW1). There was no possibility of mistaken identity.

37. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.

38. Penetration can be proved through the evidence of the victim corroborated by medical evidence. In the instant case, I shall carefully evaluate the victim's testimony and the medical evidence tendered.

39. BC (PW1) testified that on the material day (7th January 2022), the Appellant dragged her in to his house, lay her on the floor, undressed her and inserted his penis into her vagina. This testimony remained unshaken during cross examination.

40. Geoffrey Cheruiyot Kirui (PW4), a Clinical Officer at Bomet Health Centre testified that he examined the victim (PW1) and found that she had bruises and lacerations on her labia minora and majora. He also testified that he did not find any visible discharge or spermatozoa. PW4 produced a P3 Form and a PRC Form and the same were marked as P.Exh 1 and 2 respectively. I have gone through the P3 Form and PRC Form and both confirm the findings as testified by PW4.

41. I accept the medical evidence presented by PW4 that there was penetration. He observed bruised genitalia which in his professional opinion showed vaginal penetration.

42. In light of the above and in addition to the victim's testimony, it is my finding that the victim (PW1) was penetrated by the Appellant on the material day.

43. Based on the totality of the evidence before me, it is my finding that the Prosecution satisfactorily established the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

iii. Whether the Defence placed doubt on the Prosecution's case.

44. The Appellant (DW1) defence was aptly captured in detail earlier in this Judgment. He denied committing the offence and stated that the victim's mother (PW2) had a grudge with him because he refused to marry the victim.

45. I have considered the defence of the Appellant and it is my finding that it is weak and an afterthought. The Appellant had the chance to cross examine the victim's mother (PW2) and he did not raise the issue of the grudge. He also failed to cross examine PW1 and PW2 on the alleged issue of his refusal to marry PW1.

46. It was a ground of the Appeal that the Appellant's alibi defence was overlooked by the trial court. I have gone through the record and I have noted that the Appellant did not produce any witnesses in aid of his defence and therefore there was no alibi for the trial court or this court to consider. I accordingly dismiss this ground of Appeal.

47. Flowing from the above, it is my finding that the Appellant's defence as a whole, did not cast any doubt on the Prosecution's case which I have already found proven.

iv. Whether the Sentence preferred against the Appellant was harsh and severe.

48. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles.

49. The penal section for this offence is found in section 8(3) of the *Sexual Offences Act* which states that:-

> A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

50. As earlier stated, the trial court sentenced the Appellant to serve 20 years imprisonment.

51. It was a ground of the Appeal that the mandatory minimum sentence of 20 years was unconstitutional. I agree with the Appellant with regard to the unconstitutionality of the mandatory nature of minimum sentences as held by the Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic* (2017) eKLR. Through recent jurisprudence, courts have to some extent reclaimed their discretion in sentencing. The Court of Appeal in *Dismas Wafula Kilwake v Republic* (2019) eKLR held:-

> "Here at home in a judgment rendered on 14th December 2017 in *Francis Karioko Muruatetu & another v Republic*, SC Pet. No 16 of 2015, the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. While appreciate that the decision had nothing to do with the *Sexual Offences Act*, we cite it because of the pertinent observations that the apex Court made regarding mandatory sentences.....
>
> ..... In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing."

52. Similarly in *Daniel Kipkosgei Letting v Republic* (2021) eKLR, the Court of Appeal held that:-

> "The trial court sentenced the appellant to life imprisonment which was upheld by first appellate court. Both Courts expressed the view that, that was the only available sentence for the offence. However, the Supreme Court in *Francis Karioko Muruatetu v Republic* [2017] eKLR, have since held that the mandatory death sentence provided by section 204 of the penal code deprived Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Further that a mandatory sentence failed to conform to the tenets of fair trial that accrue to the accused persons pursuant to article 25 of the *Constitution*. This Court in *Jared Koita Injiri v Republic* [2019] eKLR guided by the sentiments of the Supreme Court aforesaid observed thus with regard to mandatory minimum sentences:
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> > "If the reasoning in the Supreme Court case was applied to this provision it too should be considered unconstitutional on the same basis—and set aside

the sentence for life imprisonment imposed and substituted it therefore with a sentence of 30 years from the date of sentence by the trial court."

With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment."

53. This however does not mean that the aforementioned 20 year sentence prescribed by the *Sexual Offences Act* was invalid. It was still a legal sentence that could be imposed after the trial court has considered the circumstances of a case.

54. I have considered the circumstances of this case and the fact that the victim was aged 14 years old at the time the offence was committed. Though the Appellant was rightly convicted and serving a custodial sentence, he will benefit from the mercy of this court.

55. Flowing from the above, it is my finding that the Appeal against conviction has no merit. I hereby affirm the Appellant's conviction. I however reduce the sentence from 20 years imprisonment to 15 years imprisonment.

56. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 26TH DAY OF JUNE, 2024.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant, Mr Njeru for the State and Siele (Court Assistant).