MON v Republic (Criminal Appeal E030 of 2024)
[2024] KEHC 14983 (KLR) (26 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14983 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E030 OF 2024

RE ABURILI, J

NOVEMBER 26, 2024

BETWEEN

MON ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment, conviction and sentence in Winam SPM SOA Case No. E033 of 2022 delivered on C.N. Oruo, PM on 31/3/2023)

JUDGMENT

1. The appellant herein MON was charged with the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006 the particulars being that on the 13th May 2022 within Kisumu County he intentionally caused his penis to penetrate the vagina of SA a child aged 8 years old.

2. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

3. When the charges were read out to the appellant, he pleaded not guilty and the case was set down for hearing. The prosecution called six (6) witnesses in an effort to prove their case at the end of which the appellant was put on his defence.

4. In his judgement, the trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt and proceeded to convict the appellant and subsequently proceeded to sentence the appellant to life imprisonment.

5. Aggrieved by the sentence imposed, the appellant filed his petition of appeal dated 14th May 2024 raising the following grounds of appeal:

1. That the learned trial magistrate erred in both law and facts by convicting and sentencing the appellant to life imprisonment on a case surrounded by many inconsistencies and contradictions hence not proved beyond reasonable doubt.

2. That the learned trial magistrate erred in both law and facts by imposing an indeterminate sentence of life imprisonment going against the principles of human rights and undermining the appellant's dignity.

3. That the sentence imposed was unconstitutional as it disregarded the principle of fair trial under Article 50 in addition to breaching Article 27 of the *Constitution*.

4. That the sentence went against the weight of evidence and circumstances surrounding the case hence both disproportionate to incommensurate with circumstances.

5. That may the appellant be supplied with the true certified copies of the trial proceedings to help him adduce more reasonable grounds.

6. The parties orally submitted on the appeal although they were accorded the opportunity to file written submissions. The appellant from prison had initially indicated that he had filed submissions but they could not be traced in the Case Tracking system and even after being given time to refile them, he did not comply.

The Appellant's Submissions

7. The appellant submitted and urged that the court should look at the date of the P3 form as well as the neighbour who never came to court yet he allegedly saw the appellant commit the offence.

The Respondent's Submissions

8. Mr. Marete for the state made oral submissions opposing the appeal stating that the conviction and sentence were sound. It was his submissions that the age was proved through birth certificate produced as an exhibit that showed that the complainant was 11 years old at the time of the incident that the victim positively identified the appellant as her father who defiled him and further that the victim described how she was defiled which was confirmed by the P3 form and absence of the hymen and presence of epithelial cells.

9. Mr. Marete submitted that the defence was considered and that the sentence was lawful.

Analysis & Determination

10. The role of the first appellate court is now well settled as was stated in the case of Okeno v R [1977] EALR 32 and later in Mark Oiruri Mose v R [2013] eKLR among other many decisions that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

11. The evidence before the trial court was as follows:

12. PW1, Calvin Okoth Odhiambo, a clinical officer at JOOTRH testified that he examined the complainant and filled the P3 Form and PRC form on the 14th May 2022. He testified that the victim informed him that on the 13.5.2022 at 8am her step father removed her panty and forcefully inserted his penis in her vagina, this being the 3rd incidence. It was his testimony that the hymen was missing,

there was inflammation of the vagina and that upon High Vagina Swab he detected epithelial and pus cells.

13. He produced the PRC form filled on 14.5.2022 as P Exhibit 1 and the P3 form filled on the 17.5.2022 as P Exhibit 2.

14. PW2, the complainant was taken through a voire doire and found not able to understand the meaning of an oath so she gave an unsworn testimony. She testified that the accused was her step-father whom she lives with together with her sister and mother.

15. The complainant testified that on the day of the incident she was at home sleeping in the bedroom having been chased from school. She testified that her mother had gone to work and her sister to school. The complainant testified that the appellant had already undressed came and removed her dress and panty, covered her mouth and told her not to open her mouth after which he lied on top of her and did 'tabiya mbaya'. She testified that the appellant raped her by inserting his penis into her vagina after which he left. It was her testimony that in the evening he mentioned the incident to a neighbor and her mother took her to JOOTRH and they reported to Nyamasaria Police Station.

16. PW3, Mark Obat Odago, the village elder testified that he received information of the incident on the 15.5.2022 by the complainant's mother, traced the appellant and arrested him and took him to Nyamasaria Police Station.

17. PW4, the Investigation Officer testified that the report of the incident was made on the 15th March 2022 by the complainant's mother and that the appellant was subsequently arrested and brought to the station. He produced the complainant's Birth Certificate of the complainant as P Exhibit 3 that showed that the complainant was born on the 23.11.2011 and was thus 11 years old.

18. PW6, the complainant's mother testified that on the 13.5.2022 she returned home at 7pm and found neighbours at her door and one of the neighbors told her to take the minor to hospital. It was her testimony that the appellant was her husband.

19. In his defence, the appellant denied committing the offence and testified that he was not around as he had gone to work only to return on the 18th. He testified that he was arrested by the village elder for no reason. In cross-examination, he testified that he could not tell where he was on the 13.5.2022.

20. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions by both the appellant who is self-represented and the prosecution counsel appearing for the Respondent State. I find the following issues for determination:

    a. Whether the charge against the appellant herein was proved beyond reasonable doubt and

    b. Whether the sentence imposed on the appellant was excessive and harsh or unconstitutional.

21. On the first issue, the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. To prove the offence charged, the prosecution must establish beyond reasonable doubt all the elements of defilement as was stated in the case of George Opondo Olunga v Republic [2016] eKLR that the ingredients of an offence of defilement are: identification or recognition of the offender, penetration and the age of the victim. The prosecution was therefore under a duty to establish or prove all the above elements of defilement beyond reasonable doubt. That duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses. The accused was also under no duty to give any self-incriminating evidence.

22. The appellant's identity is not in issue, he is the complainant's step-father and the complainant testified that she lived with the appellant, her mother and sister.

23. Regarding the complainant's age, PW4, the investigating officer testified that the complainant was 11 years old. She produced a copy of the complainant's birth certificate as PEX 3 showing that the complainant was born on the 23rd November 2011 meaning that by the time of the offence the complainant was 10 years 6 months old.

24. On the issue of penetration, 'Penetration' is defined under Section 2 of the *Sexual Offences Act* to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'. The complainant testified that the appellant found her sleeping, took off her clothes and did "tabia mbaya' to her. She reiterated that the appellant raped her by putting his penis in her vagina.

25. On his part the appellant denied committing the offence and gave an alibi that on the date of the incidence he was away only to return on the 18th. He stated that he did not know the reasons for his arrest and in cross-examination it was his testimony that he did not know where he was on the 13th, the day of the offence.

26. Section 124 of the *Evidence Act* provides that:

> Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.'

27. The evidence of the complainant on the fact of her being defiled was corroborated by that of PW1- the clinical officer as indicated in the P3 and PRC forms. PW2 testified that on examination of the complainant he noticed that the complainant's vagina was inflamed, that the hymen was absent and that there were epithelial and pus cells upon undertaking a High Vagina Swab.

28. PW2, the complainant, was firm in her testimony that the appellant defiled her.

29. The appellant was not obliged to exonerate himself. He stated in cross examination that he did not know where he was on the date of the offence. In his evidence in chief, he stated that he went to work and returned on 18th and that he did not commit the offence.

30. The Court of Appeal in the case of Kiarie Vs Republic (1984) KLR stated as follows on defence of alibi:

> " An alibi defence raises a specific defence and an accused person who puts an alibi defence does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduced in the mind of a court a doubt that is not unreasonable" When the defence of alibi is raised at the defence stage, it should not escape the scrutiny of the court. The prosecution no doubt required adequate notice to investigate the allegation of alibi defence. The governing principle on alibi defence is that it must be disclosed early enough in the proceedings to permit it to be investigated by the police. That determines the weight the court will give to it."

31. The alibi defence of not being there during commission of the offence and the appellant not knowing where he was on the date of the offence is in my view self-defeating, in as much as the appellant was not obliged to give self-incriminating evidence. Neither was he obliged to adduce any evidence to exonerate himself. The alibi defense which was raised during the defence hearing that he was not there and at no time did it come up during his cross-examination of the prosecution witnesses, juxtaposed with the evidence adduced by the prosecution witnesses, the complainant and the medical officer who examined her, the prosecution evidence as adduced overwhelmingly displaced the appellant's defence.

32. On alleged contradictory evidence of the prosecution witnesses, I have considered evidence adduced by the witnesses for the prosecution as a whole. I find no material contradictions as alleged by the appellant in his appeal. It is not enough to plead contradictions. One must point out what contradictions exist and how those contradictions were so material that they affected the credibility of the evidence adduced against the appellant. The Court of Appeal in the case of Richard Munene v Republic [2018] eKLR stated as follows on contradictions in evidence:

> It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.'

33. Accordingly, I find that the assertions that the prosecution evidence was contradictory was devoid of any merit. There was no material contradiction in the prosecution case as to prejudice the appellant.

34. The appellant asked this court to look at the P3 form and the neighbor who never came to testify yet he allegedly saw the appellant commit the offence. I have examined the P3 form and all it does is to corroborate the testimony of the complainant that she was defiled. It contains the findings of the medical officer who examined the victim complainant following the alleged offence.

35. On the other hand, PW2 the minor only said that she told the neighbour of what her father, the appellant had done to her and from the testimonies of the other witnesses including the victim's mother PW5 and the village elder PW3, the victim went and informed the neighbour who reported the incident to the village elder. The neighbour in question did not witness the incident. The victim was brave enough to notify a third party and as a result, the appellant was arrested and there is no evidence that he was framed up, noting that he mother was away when she was defiled in the appellant's bedroom.

36. what this court deduces from the appellants submission is that the appellant alleges that a vital and crucial witness was not called. As I have stated above, there is no evidence that the neighbour who informed the village elder about the defilement was an eye witness or that her or his evidence was so crucial that its omission should be interpreted that had the neighbour been called to testify, would have given evidence adverse to the prosecution's case.

37. Be that as it may, it is trite law that no particular number of witnesses are required for the proof of a fact. Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides that:

> "No particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact."

38. In Keter v Republic (2007) E.A 135 it was held that:

> " The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

39. Thus, the prosecution has the discretion to determine the relevant witnesses it wishes to call and can only be faulted if it fails to call crucial witnesses for ulterior motives. This is because the prosecution bears the burden of proving its case beyond reasonable doubt and as was stated in the case of Nalkona v Republic (Criminal Appeal E013 of 2023) [2024] KEHC 4019 (KLR) (23 April 2024) (Judgment), by L.Gitari J that the prosecution must and must therefore exercise discretion to determine who to call as a witness to discharge that burden.

40. In the instant case, I am satisfied that the prosecution called all the key and crucial witnesses to support its case.

41. There is no witness who stated that he or was present or that they witnessed the defilement taking place. I therefore find that the appellant's complaint that the neighbour did not testify to be without substance.

42. In the end, I find and hold that the prosecution proved the element of penetration beyond reasonable doubt.

43. On the whole, I find and hold that the prosecution proved its case beyond reasonable doubt against the appellant on the charge of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006 and that the conviction of the appellant for the said offence was sound and safe.

44. As to whether the sentence imposed on the appellant was excessive, harsh or unconstitutional, the appellant pleaded in his grounds of appeal and submitted that his 20-year sentence was excessive. Article 50 (2) (p) of the *Constitution*, 2010, which provides that:

> Every accused person has the right to fair trial, which includes the right.
>
> (p) To the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentence:'

45. In Alister Antony Pariera v State of Maharashtra, as cited in the case of Margrate Lima Tuje v Republic [2016] eKLR the court held that:

> Sentencing is an important test in matters of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused in proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.'

46. I note that section 8 (2) of the *Sexual Offences Act* provides that upon conviction, the offender shall be imprisoned for life. Previously, the principle laid down by the Supreme Court Francis Karioko Muruatetu & Another v Republic [2017] eKLR, was that, provisions of law which exclude or fetter discretion of a court of law in sentencing were inconsistent with the *Constitution*.

47. The Court of Appeal on its part stated that pursuant to the Supreme Court's decision in the Muruatetu (2017) case, if the reasoning is applied, the sentence stipulated by section 8(2), (3) and (4) of the *Sexual Offences Act* which is a mandatory minimum should also be considered unconstitutional on the same basis. See Jared Injiri Koita v Republic [2019] eKLR.

48. The reasoning for the holding by the Supreme Court and the Court of Appeal was that the mandatory minimum or maximum sentences deprived the Court of its legitimate jurisdiction to exercise discretion in sentencing. It was further observed that mandatory sentences fail to conform to the tenets of fair trial which are an in-alienable right guaranteed under Articles 50 and 25 of the *Constitution*. See Christopher Ochieng v Republic KSM CA Criminal Appeal No 202 of 2011 [2018] eKLR, and Jared Koita Injiri v Republic.

49. However, the Supreme Court in the case of Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KLR clarified the position and stated interalia that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution* but that the said decision only applied in respect of sentences of murder under Sections 203 and 204 of the Penal Code, which was the case before the Supreme Court. See also Republic versus Joshua Gichuki Mwangi [2024] eKLR.

50. Taking into consideration the decision of the Supreme Court in Muruatetu 2021 (supra) and Joshua Gichuki Mwangi (supra), it is clear that the mandatory sentence provided in section 8 (2) of the *Sexual Offences Act* is lawful but not necessarily mandatory. In the latter case, the Supreme Court stated inter alia, as follows, regarding the mandatory minimum sentences under the *Sexual offences Act*:

> "65. We also note that the Court of Appeal concluded its decision in this present matter by reducing the Respondent's sentence from the minimum of 20 years to 15 years. In doing so, the Court of Appeal did not clarify the considerations that went into its decision to reduce the sentence. The reasoning behind the court's decision is called into question by this omission as sentencing is a matter of fact unless an Appellate Court is dealing with a blatantly illegal sentence which was not the case in the present matter.
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> 66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.
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> 67. This is why, even in the Muruatetu case, this Court was keen to still defer to the Legislature as the proper body mandated to legislate. While the courts

have the mandate to interpret the law and where necessary strike out a law for being unconstitutional, this mandate does not extend to legislation or repeal of statutory provisions. ...”

51. In his mitigation, the appellant prayed for leniency. Taking into consideration the circumstances of this case, the nature of and how the appellant committed the offence, especially that the complainant was a child under his custody who looked up to him for protection but instead found violation, I find no reason to interfere with the trial court’s sentencing of the appellant.

52. I hereby uphold the sentence imposed on the appellant by the trial court. However, as the appellant was in custody during the trial, I order that the sentence imposed shall be calculated from 18/5/2022 when he was arrested, as per the charge sheet dated 19th may, 2022. This is in line with the provisions of section 333(2) of the Criminal procedure Code.

53. The upshot of all the above is that I find this appeal lacking in merit and I proceed to dismiss it.

54. This file is closed. The lower court record to be returned forthwith.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF NOVEMBER, 2024.

R.E. ABURILI

JUDGE