Maiyo v Republic (Criminal Appeal E076 of 2021)
[2024] KEHC 15940 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15940 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E076 OF 2021

E OMINDE, J

DECEMBER 19, 2024

BETWEEN

KELVIN KIPROP MAIYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the conviction and sentencing of the Appellant in Eldoret Chief Magistrates Criminal Case (Sexual Offences) No. 192 of 2019.

2. The Appellant was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 15th August 2019 in Kapseret Sub County within Uasin Gishu County, the appellant unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of GW a girl aged 17 years.

3. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on 15th August 2019, within Kapseret Sub County, within Uasin Gishu County, he unlawfully and intentionally caused his genital organ (penis) to come into contact with the genital organ (vagina) of GW, a girl aged 17 years.

4. The Appellant pleaded not guilty and the matter proceeded to full trial wherein the prosecution called 6 witnesses. After close of the prosecution case, the trial Court found that the Appellant had a case to answer and placed him to his defence. The Appellant testified in his defence but did not call any witnesses.

5. Upon considering the testimonies and the evidence presented, the trial Court convicted the Appellant of the main charge and sentenced him to 15 years' imprisonment. Aggrieved with the sentence and

conviction, the Appellant instituted the present appeal vide the Petition of Appeal filed on 19/11/2021 premised on the following grounds;

i. That the trial magistrate erred in law and facts by convicting the appellant without proper evaluation of the defense of alibi without proper evaluation of it.

ii. That the trial magistrate grossly misdirected herself by convicting (me) without realising that witnesses did not turn up to shed light on the case.

iii. That the trial magistrate erred in law and in facts as it failed to observe the victim PW1 presented herself to the accused home.

iv. That (I) am aggrieved the trial court erred in law and facts by convicting (me) without recognising that the charge sheet was fatally defective.

v. That the trial magistrate erred both in law and fact by convicting the appellant based on fabricated, inconsistent, farfetched and uncorroborated evidence.

vi. That the learned trial magistrate erred in law and facts by shifting the burden of proof from the prosecution backyard to the appellant when the evidence failed to link him to the offence.

vii. That other grounds will be raised during the hearing.

Prosecution evidence before the trial Court

6. PW1 was the complainant. She testified that she was born on 11/02/2002 and she produced her birth certificate as Pexh1. She recalled that on 15/08/2019 she was at Kapseret with the Appellant's aunt and the Appellant, adding that she has known the appellant from 2017 and her mother never suspected that she had a relationship with him. That on 12/08/2019, their neighbour told her mother that she had been with him and her mother threatened to beat her so she opted to go with the appellant and his aunt.

7. That she lived with them and on 15/08/2019 his aunt left after which they were arrested. She testified that she was his girlfriend and confirmed that she slept with him on 15/08/2019. However, she stated that the first time she had sex with the appellant, he forced her and that there was no one around. She also later stated that he was not her boyfriend. It was her testimony that the Appellants' Aunt left the house at around 1.00 pm and she (PW1) went to his house at around 3.00pm. That it was a small house that was not in the main house. She stated that they then heard the door being knocked and upon opening there were 3 policemen, her mother and the aunt the appellant lived with.

8. That they were taken to Pioneer police post then to Langas police station. Afterwards, she went to MTRH with the policemen where she was tested and issued with a P3 form which she produced as MFI-2. In cross examination she testified that there was no plot against the appellant and that after his aunt left, she is the one who called him and forced him to sleep with her.

9. PW 2 was TI, the complainant's aunt. She testified that on 12/08/2019 at around 5.00pm she received reports that the complainant was seen with the appellant who was not in good terms with her. She called the complainants' mother and her mother after which she was told to give the complainant fare to go to Matunda. As the complainant did not go to Matunda, they started looking for her and they knew that the appellants' aunt had a place at Kapseret. They went to said place and found the appellant and the complainant in a room. They were taken by the police to the police station then to MTRH where the complainant was subjected to tests. After that they then went home to await the results. She testified that the complainant's mother suspected that they had a relationship and chased them away on 2019.

10. PW3 was EAI, the mother to the complainant. She testified that on 12/08/2019 she received a call from her sister that the complainant had been going to her grandmother's place and was missing. That at the time, the complainant was 16 years old as she was born on 11/02/2002. On 15/08/2019, via Facebook, a lady informed her that she had seen her at Kabarnet and she went to find her in the company of askaris. They found the appellant and the complainant naked and they were told to dress and taken to the chief's camp at Pioneer they were later taken to Langas police station and booked. They took the complainant to MTRH and she was examined and issued with a P3 form. She stated that they lived with the appellant in the same plot but he later moved.

11. PW 4 was PC Sagion Makubo John of Pioneer police post. He testified that on 15/08/2018 a lady who had reported her daughter's loss earlier said she had gotten information on her whereabouts. They asked her to facilitate transport and they went to the area where the girl was. They entered the homestead and met an old man to whom they explained the reason of their visit. He told them that the lady had been in the boma for 2 days and he was worried since she was underage. They entered the house and after the appellant opened the door he saw the girl in bed and they both had no clothes. They allowed them to dress and took the appellant to Langas police post.

12. PW 5 was Dr. Lilan Taban Tokosong of MTRH. She testified that she examined the complainant whose clothes were intact and upon examining her, she discovered that her hymen was ruptured and she had a whitish discharge. No spermatozoa were seen but there were epithelial cells present.

13. PW6 was PC Dovah of Langas Police station. She testified that she got the file from PC SGT Morul who was on transfer. The Investigating Officer investigated the matter from a case reported by the complainant. She testified that the complainant disappeared on 12/08/2019 and went to the Appellants' house. They were both taken to MTRH and P3 forms filed. She stated that the investigations were proper and that she had looked at the birth certificate which showed that the complainant was 17 years old as at 15/08/2019. She produced the birth certificate as Pexh-1.

Defence Case

14. The Appellant gave sworn testimony in his defence. He testified that the complainant was his neighbour. That on 12/08/2019 he was at home when the complainant called his mother on phone at around 8.30 pm and told her she was on the way to their home. His mother sent him to find her which he did and brought her home. They hung out and she stayed with them until 15/08/2019. He left for town on that date and when he came home he was arrested at around 3.30pm. It was his testimony that he used to help the complainants' mother and since he left the plot she said she had suffered.

15. Further, he testified that they did not have a previous relationship and she had told him that he would regret. It was his testimony that when he asked what he had done, he was told that the complainants' mother had been alerted that he had G at their home. Further, that the complainant's mother asked for Kshs. 500,000/- from him. When he was told that he had defiled the complainant he was surprised and when he told her he didn't have the money, she said she will come when he is ready. On 17/08/2019, she came back and demanded that he pay the money. She then opted to go to court. He denied being found with the complainant and said that she lied that she was in his house.

16. In cross examination, he testified that his witness was Rose Maiyo, his mother, who knew the complainants' mother as they were neighbours. Further, that he had been helping her pay rent as a friend and had no relationship with her. He stated that they disagreed on money issues.

Judgment of the trial Court

17. As aforesaid, upon considering the testimonies and the evidence presented, the trial Court convicted the Appellant of the charge of Defilement and sentenced him to 15 years imprisonment.

Hearing of the Appeal

18. The Appeal was canvassed by way of written submissions. The Appellant filed his Submissions on 24/07/2024 in person while the State filed on 1/02/2024 through Prosecution Counsel Mr. S.G Thuo.

Appellants' Submissions

19. In his submissions, the appellant urged that the sentence of 15 years is excessive and serves neither the interest of justice or the society because sentencing should have a role of salvaging and rehabilitating the offender, citing the case of Patrick Gilbert Cholmondely vs Republic (2009) eKLR. He urged the court to invoke Articles 27 and 28 of the *Constitution* and Sections 354, 364 and 365 of the Criminal Procedure Code and decide on a lesser sentence considering that the appellant has served a substantial part of his term being 5 years.

20. The appellant further submitted that being a first offender, the sentence was too harsh and that the court failed to consider the mitigating circumstances. He urged that he was the sole breadwinner of the family and his family depended on him for their survival. Further, that since he was incarcerated he has undergone reform and attained a certificate of discovery bible school, a certificate on health programs and produced a recommendation letter. Additionally, he prayed that the time he spent in custody during the trial be considered pursuant to section 333(2) of the Criminal Procedure Code and his sentence be reduced or substituted with a custodial one.

Respondents' Submissions

21. In his submissions on behalf of the state, counsel referred the court to the decision in Supreme Court Petition No. E018 of 2023 – Republic vs Joshua Gichuki Mwangi & Others where the justices of the Supreme Court reiterated that the decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the Penal Code, *Sexual Offences Act* or any other statute. Further, that the Muruatetu decision cannot be the authority for stating that all provisions of law prescribing minimum or mandatory sentences are inconsistent with the *Constitution*. He urged the court to uphold the 15-year sentence that was handed to the Petitioner.

Analysis & Determination

22. A first Appellate court has a duty to carefully examine and analyse afresh the evidence presented from the lower court and draw its own conclusions. It must not necessarily agree with the findings of the trial court and must bear in mind that it lacks the privilege of seeing and examining the demeanour of the witnesses first hand. (See Okeno vs. Republic [1972] EA, 32 and Kiilu & Another vs. Republic [2005] 1 KLR, 174])

Defective Charge Sheet

23. On the issue raised by the Appellant that the Hon Trial Magistrate failed to hold that the charge sheet was defective, Section 134 of the Criminal Procedure Code provides as follows:

> " Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with

such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

24. In the case of Sigilani vs Republic, (2004) 2 KLR, 480 the Court held that:

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

25. I have perused the pleadings in this case. I note that apart from making this allegation the Appellant has not at all demonstrated to Court what the defect in the Charge was that the Hon Magistrate ought to have upheld. I have also perused the said charge sheet. The same has clearly laid out the offense and the provision of the law under which it has been brought, the identity of the accused and the complainant which later provisions required be redacted, as well as the date time and place of the commission of the offence.

26. The said charge sheet also has all the parameters required to be filled correctly so filled and the necessary rubber stamps by all the agencies that handled the said Charge sheet viz the Police, the ODPP and the Court affixed as appropriate. In this regard, I am satisfied that the said Charge had no defect at all that needed that the Trial Magistrate finds and upholds the same to be defective. I therefore find no merit on this ground of Appeal and I accordingly dismiss the same.

Defilement - Elements

27. Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* provides as follows on what constitutes defilement;

> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

28. In the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013 the court laid out the elements of the offence of Defilement as follows:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

Age of the Victim

29. In the case of Fappyton Mutuku Ngui vs. Republic [2012] eKLR it was held as follows:

> ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

30. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

31. In the present case the age of the victim was ascertained by way of her birth certificate which was produced in evidence as Pexh1. The same confirmed that as at 15th August 2018, the victim was 17 years old.

Penetration

32. Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person.

33. In the case of Mark Oiruri Mose v R [2013] eKLR the Court of Appeal stated that:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ." (Emphasis added).

34. In the instant case, the P3 Form that was produced by the Prosecution in support of the charge of defilement and which was marked as Pexh 2 indicated that the victim had a fresh hymeneal tear at 7 o'clock, healed tears at 11,1 and 5 o'clock and abrasions and in conclusion, the Doctor who testified as PW5 concluded in her report that "there is evidence of recent penetration and therefore findings are highly consistent with defilement"

Identification

35. In the case of Kariuki Njiru & 7 others vs Republic, Criminal Appeal no. 6 of 2001 (Unreported) the court held as follows:

> " Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

36. On 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. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn

itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

37. The Court of Appeal held as follows in instances where an Appellant is well known to the victim which then would be a case of Identification by recognition in the case of Kariuki Njiru & 7 others vs Republic, Criminal Appeal no. 6 of 2001 (Unreported) the court held as follows:

> " Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

38. Further, in the case of Reuben Tabu Anjononi & 2 Others v Republic [1980] eKLR, the Court of Appeal guided as follows:

> "..... This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported)....

39. In the instant appeal, I note from the evidence and more particularly from the defence of the Appellant that the victim was well known to him and vice versa. Of special significance is that the accused in his defence testified that he knew the victim because she was his neighbour at Eldoret and the victim's mother too was his neighbour at Karen Estate. In this regard then the evidence on how the victim identified the Appellant is that it was by way of recognition and as held by the Court of Appeal in the above cited case, it is more satisfactory, more assuring and more reliable and this being the position, I find no justifiable reason to disturb the Trial Courts finding based on this evidence.

40. The Appellant also stated in his Grounds of Appeal that the trial magistrate erred in law and facts by convicting him without a proper evaluation of the defence of alibi which he had raised. Without going into much ado on this ground, it suffices to say that I have perused the proceedings of the Lower Court and nowhere in those proceedings was the defence of alibi raised. It follows therefore that this ground too lacks merit for it has no legs to stand on at all.

41. On the Ground that the Trial Magistrate grossly misdirected herself by convicting the Appellant without realising that witnesses did not turn up to shed light on the case is a gross misrepresentation of what transpired in the Trial Court. As is apparent from the proceedings of the Lower Court as summarised above, a total of six witnesses testified and their various testimonies were well summarised in the impugned judgement, analysed and a determination reached based on the said evidence. It follows therefore that this ground too is without substance and/or merit.

42. On the Ground that the trial magistrate erred in law and in facts as it failed to observe that it is the victim PW1 presented herself to the accused home, I have considered the Appellant's defence which I find by itself negates this assertion for reasons that he states that at the time of his arrest, he was alone in his house and the victim went to his house in the company of the police officers, his parents and the victim's mother. This ground too therefore has no merit.

Sentence

43. Section 8(4) of the *Sexual Offences Act* prescribes the sentence for defilement as follows;

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

44. In the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) in setting aside the declaration of unconstitutionality of mandatory sentences as laid out in Mwang*i v Republic (Criminal Appeal 84 of 2015*) [2022] KECA 1106 (KLR), the learned justices of the Supreme Court expressed themselves as follows;

> 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.

45. The Court further stated as regards the minimum and mandatory sentences imposed by the *Sexual Offences Act* 2006;

> " .....the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence"

46. In this regard then being satisfied that the victim herein was 17 years old at the time of the commission of the offence, then the applicable sentence as provided under the Act and that is a term of imprisonment of not less than 15 years. The Hon Magistrate sentenced the Appellant to 15 years imprisonment and being satisfied that the sentence is lawful and legal and I accordingly uphold the same.

Consideration of time spent in custody during pendency of trial

47. Section 333(2) of the Criminal Procedure Code provides as follows:

> " Subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody."

48. The Judiciary Sentencing Policy Guidelines (2014) also provides as follows:

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

49. The Court of Appeal, in the case of Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR held as follows;

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

50. In light of the above, it is clear that the application of the provision of Section 333(2) upon conviction is mandatory and if it is apparent that the same was not applied by the Trial Court, then this Court is obligated to remedy this omission. Much as the Appellant did not state the period of time that he was in custody during the trial, I have perused the Lower Court file and there is no evidence indicating that the accused was out on bond during the trial. I have also perused the sentence and it shows that that the Trial Magistrate did not factor in the period spent in custody in the sentence.

51. The record shows that the plea was taken on 19th August 2019 and the Appellant was sentenced on 15th November 2021 bringing the period spent in remand to two years and three months. In finding merit with the appellant's appeal on this ground, I allow the same and direct that this period be computed in the imprisonment term of 15 years to which the appellant was sentenced by the lower Court.

52. The upshot then is that save for the ground that the period spent in remand be considered in the sentence meted out, the Appellant's appeal against conviction and sentence on all the other grounds is dismissed for want of merit.

READ DATE AND SIGNED AT ELDORET ON 19TH DECEMBER 2024.

E. OMINDE

JUDGE