BBW v Republic (Criminal Appeal 122 of 2019)
[2023] KEHC 2429 (KLR) (27 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2429 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 122 OF 2019

RN NYAKUNDI, J

MARCH 27, 2023

BETWEEN

BBW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentence and conviction of Hon, D Milimu (SPM) in Eldoret Criminal Case No. 138 of 2017 – R vs Benjamin Barasa Wekesa delivered on 19th July 2019)

JUDGMENT

1. 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. The particulars of the offence were that on 9th July 2017 at [Particulars Withheld] in Eldoret West District, within Uasin Gishu county intentionally and unlawfully caused his genital organ to penetrate into the genital organ (anus) of LOO, a child aged 7 years.

2. The accused pleaded not guilty and the matter proceeded to full hearing. PW1, CA, a manual labourer in Eldoret testified that she knew the accused as her husband, that on 9th July 2017 at around 8pm her husband took one of the children they lived with, her brothers' daughter and returned with her at around 10.30 pm holding her hand. The child was shaking and the following morning he asked her what happened, the child told her that the accused had gone with her, taken her to a bush, cover her eyes and done 'bad manners' with her. When she later took the child to Huruma hospital, a doctor examined the child and told her she had been defiled. She was issued with a letter which she took to Baharini police station where they were issued with a P3 form, they then took the same to the hospital to be filled and the same was produced in court as PMFI-1.

3. A voir dire was conducted on the child and when the trial magistrate was satisfied that the witness understood the difference between lying and telling the truth, allowed PW2 to give an unsworn statement. She stated that she was 7 years old and identified the accused person as baba who she lived

with. She stated that he told her to accompany him to buy onions at night. She described the 'bad manners' he did to her with his private parts and described the ordeal in detail. She also identified the accused in court.

4. PW3, RW, testified that the complainant is her daughter who lived with the accused and his wife as they were in laws. She was called on the material date and informed that the accused had left with her daughter at 10.50pm. On 10th July 2017 she left to Eldoret and upon reaching there she found her in law ready to go to the police station. she corroborated the testimony of PW1 that they went to the hospital and the minor was examined. She produced the lab tests and the prescription notes in court as evidence and produced a VCT identity card as evidence that the complainant was 7 years' old.

5. PW4, Justina Kosgei, a senior clinical officer at Huruma County hospital testified that she examined the complainant on 10th July 2017 and determined that she had been sexually abused. She produced the P3 form as evidence.

6. PW5, Geoffrey Wesonga, a resident of [Particulars withheld], testified that on the material date he saw the accused go with the child and when they were told that she was missing, they searched for them until 10.50 when the accused resurfaced with the child. She had some scratches on her face and her clothes were muddy. The child was later asked what was going on and she explained the incident.

7. Upon considering the evidence tendered in court, the testimony of the witnesses and submission of the parties, the trial magistrate found that the prosecution had proved its case to the required standard and sentenced the accused to life imprisonment.

8. The appellant, being aggrieved with the sentence and conviction of the court, instituted the present appeal vide a petition of appeal filed on 23rd July 2018 premised on the following grounds;

    1. That the learned trial magistrate erred in both law and fact by convicting me hence the complainant herein was compelled to implicate me the appellant.

    2. That the learned trial magistrate erred in both law and fact by convicting me which the doctor said, that there was nothing found to link me with the said offence.

    3. That the learned trial magistrate erred in law and fact in failing to hold that I was not given right to be diagnosed to establish if I was the perpetrator.

    4. That the learned trial magistrate erred in law and fact in failing to summon two defence witnesses.

    5. That, he be supplied with the lower court proceedings in advance to enable him prepare more supplementary grounds to urge on the same during the hearing date.

9. There are no submissions on record for either party.

Analysis & Determination

10. This being an appellate court, it has a duty as was set out in Okeno V. Republic [1972] EA 32 where the court stated as follows:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -V- R. (1975) EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported.

In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

Issue for determination

11. Upon considering the petition of appeal and grounds contained therein, the following issues arise for determination;

    1. Whether the offence was proved to the required standard

    2. Whether the sentence was harsh/excessive in the circumstances

Whether the offence of defilement was proved to the required standard

12. Section 8(1) as read with section 8(2) of the Sexual Offences Act states;

    (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

13. The ingredients of the offence of defilement were set out in the case of George Opondo Olunga v Republic [2016] eKLR, as; identification or recognition of the offender, penetration and the age of the victim.

14. The age of the complainant was proved by the production of her birth certificate which showed her date of birth was 3rd September 2009. The offender was identified by recognition as he was a relative to the complainant and they lived with him. Penetration was proved by way of medical evidence which corroborated the testimony of the complainant. In the case of Bassita vs Uganda S.C Criminal Appeal No.35 of 1995 the Supreme Court of Uganda held as follows:

> " The act of sexual intercourse of penetration may be proved by direct or circumstantial evidence Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable, it is not hard and fast rule tht the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse of penetration. Whatever evidence the production may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt" It follows that the elements of the offence of defilement were proved to the required standard of beyond reasonable doubt. As noted from the testimony of the witnesses, there is no iota of evidence from the defence to dislodge the observation on both direct and circumstantial evidence as to the guilty of the Appellant. The grounds in the Memorandum of Appeal have also failed to establish a non-responsive nexus between the evidence and the verdict of the trial court on conviction.

15. Even on Appeal the case for the prosecution rest entirely on the canon of beyond reasonable doubt. In the case of STATE OF UP –V- KRISHINA GOPAL & ANOTHER AIR 1988 SC P. 2154 the Supreme Court had this to say:

> " There is an unmistakable subjective element in the evaluation of the degree of probability and quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and ultimately on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time,

uniformed legitimization of trivialities would make a mockery of administration of criminal justice"

Whether the sentence was harsh/excessive

16. The provisions of section 8(2) of the Sexual Offences Act prescribes a mandatory life sentence for the offence of defilement where the child is aged 11 years or less. Whereas mandatory sentences for sexual offences have since been declared unconstitutional, courts have unfettered discretion to prescribe sentences which may be equal to the prescribed mandatory sentences. The Court of Appeal in Criminal Appeal no. 84 of 2015 – Joshua Gichuki Mwangi vs Republic held that;

> "We acknowledge the power of the Legislature to enact laws as enshrined in the Constitution. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.
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> This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of the Constitution. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of the Constitution to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the Constitution.

17. In Mombasa High Court Constitutional Petition No. 97 of 2021 – Edwin Wachira and 9 others vs Republic, Hon. Mativo J, when declaring that courts should have unfettered discretion in sentencing held as follows;

> "For avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence."

18. Similarly the Court of Appeal in Benard Kimani Gacheru –vs-Republic (2002) eKLR restated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not

sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

19. Even in a more lasting comfort on the politics of minimum sentences and the rule of Law in the emerging jurisprudence, the courts in exercising discretion must consider the range of offences, circumstances in which they were committed, and based on those particularities pass a verdict which serves the interest of justice to the crime. This case when viewed from any coherent normative perspective, the position of mandatory minimum sentences, the public good and the measure of compelling reasons, this court finds a measure of ground to interfere with the sentence imposed by the trial court. The court's concern is for the substantive integrity of the law in sentencing and subject to discretionary power be left to a case by case basis. To the contrary viewed from the statutory structure on sentencing, it is the duty of the Appellant to formulate his or her Appeal on the plurality of probative evidence to deductively draw all the consequences as to why the life has not been met by the Appellant. Further weighing the mitigation of the appellant and the circumstances of the case, the gravity of the offence committed and the impact it shall have on the life of the victim and whether the trial court exercised the discretion judiciously is not fundamentally in question. When looked at from the eyes of the legislature. Life imprisonment as a sentence in Kenya covers a range of offences which our society reflected and considered that by their very nature they deserve a punitive deterrent penalty. The only question is whether the imposition of life sentence on the ground that the convict removal from society should be permanent and that such a sentence was the only fitting sentence for that crime. The Southern African Supreme Court of Appeal in Martin –vs. S (1998) J.L (268)W made the following observation on Life Imprisonment as a sentence:

> " An approach that life imprisonment is what is appropriate for a bad man committing a bad crime dis regards that such a norm tends to create disparity. Life sentence imposed upon a lively man of 30 imposes a much longer and harsher sentence that the nominally identical sentence when imposed on a man of 65 who has lost interest in everything around him. Little else but the established need to use detention as a means of presenting repetition of crime by the accused can justify ignoring such discrepancies. But there is also an aspect of cruelness to a life sentence.....the man who is incarcerated for life does have a curtain drawn on awareness. There is no dividing date which ends his subjective suffering and renders him an aware of the past, or of the futility of the future. When he is subjected to is an ending punishment, day after day. It is life without future hope, coupled with a permanence of suffering. It is extremely unpleasant while it lasts. Which is interminable"

20. There is no doubt that the rate of growth of life imprisonment sentences, following the enactment of the sexual offences Act, seems to have out spaced prison facilities in Kenya. Those serving life sentences, have been filing petitions seeking review before the High Court for one reason or another even after exhausting the Appeal's process to the court of Appeal. In the last decade also the Proliferation of sexual offenders has also contributed to the increase of life sentences. Yet the meaning of life sentence is apparent not self-evident from the governing statute or the sentence policy guidelines of the judiciary 2016. Fundamentally, the framers of the constitution perhaps having this class of sentence in mind provided for the power of mercy under Article 133 of the constitution. This hope in this context could be interpreted that life sentence in Kenya has a component of parole. It is therefore important to note the parameters and protocols engraved in Article 133 may not be very clear to many convicts as to the categorical ineligibility or legibility criteria for the power of mercy for them to be granted clemency. So in general terms sentences of life imprisonment are simply painted as those without parole upon exhaustion of post- conviction Appeals. It is common knowledge that convicts incarcerated for long periods of time even with harsh conditions access scarce opportunities for education, technical training,

counselling or some meaningful work or productive activities. At the very least if there sentencing life without parole all those skills are not impactful. There is insufficient evidence that life imprisonment under section 8 (1) & (2) of the sexual offences Act, as read with proviso in Section 20 has reduced recidivisms. In Lowe –vs the Queens (1984) 154 CLR 606 at 609 stated that

> " it is obviously desirable that persons who have been parties to the commission of the same offence should if other things are equal receive the same sentence, but other things are not always equal and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account."

21. It is sobering to recall that when the Supreme Court overturned all the existing mandatory death sentences for the offence of murder on constitutional grounds a number of innocent lives have been spared. The recent trend towards change of sentencing philosophy in Kenya is a response towards the principles in the Muruatetu case –vs- Republic 2017 eKLR and most recently Joshua Gichuki Mwangi -vs- Republic in Criminal Appeal No 84 of 2015. Following these decisions the evolving jurisprudence is for individualised sentencing. In the case at bar, it is perhaps most responsive taking into account a myriad of factors to sentence the Appellant to a determinable period of 40 years custodial sentence with effect from 12th July, 2017 as a substitute of the life imprisonment. As a consequence both Appeal and sentence lack merit save for variation of the life imprisonment to a terminable period. Orders accordingly.

22. The Right of Appeal explained to the Appellant.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 30TH DAY OF MARCH 2023

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R. NYAKUNDI

JUDGE

In the Presence of:

Mr. Mugun for the state

Appellant –Present