SMK v Republic (Criminal Appeal 23 of 2017)
[2023] KEHC 21089 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21089 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 23 OF 2017

J WAKIAGA, J

JULY 27, 2023

BETWEEN

SMK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence of the Magistrate Court at Kigumo CM CRIMINAL CASE NO 1048 of 2016 on 11/7/ 2017 by Hon. A Mwangi - SPM)

JUDGMENT

1. The Appellant was charged, tried, convicted and sentenced to life imprisonment on the offence of defilement Contrary to Section 8(1) (3) of the *Sexual Offences Act* No 3 of 2006. The particulars of which were that on the 14th day of July 2016 in Muranga County intentionally caused his penis to penetrate the vagina of TWN a child aged 8½ years.
2. Being dissatisfied by the said conviction and sentence, he filed this appeal and raised the following amended grounds of appeal:
    a. *Voir dire* was not conducted.
    b. The medical evidence did not conclusively prove that the Appellant had committed the offence as per the DNA test.
    c. The Court did not take into account the existence of a grudge between the complainant's mother and the Appellant who was her brother in law.
    d. The sentence was harsh and excessive Contrary to Section 216 and 329 of the *Criminal Procedure Code*.

3. When the appeal came up for hearing the Appellant who was not represented filed amended grounds of appeal together with written submissions which he relied upon while Ms Nzuki appeared for the prosecution and opposed the appeal through Oral submissions.

4. It was submitted by the Appellant that the *Voir dire* conducted did not comply with the law as was stated in *Joseph Opondo v Republic* and *Patrick Wamuyu Wanjiru v Republic*. It was submitted that the medical evidence was not conclusive of penetration as the Doctor noted that her external genitalia was normal with hymen missing and that there was a requirement of DNA to link the Appellant with the offence as was stated in *Amos Kinyua Kugi v R* [2015] eKLR.

5. It was contended that the Appellant was arrested at the behest of the complainant's mother with no proper investigations being conducted as the arrest was as a result of a grudge between the complainant's mother and the Appellant. The prosecution case was not proved to the required standard. It was submitted that the sentence was harsh as the mandatory nature of the same was contrary to the Bills of Right under the *Constitution* and that the Court should take into account the decision in *Evens Wanjala Wanyonyi v Republic* where the Court substituted a sentence of twenty years with ten.

5. On behalf of the state Ms Nzuki submitted that the issue of the grudge was raised by the Appellant in his defence and the same was adequately responded to. It was submitted that the Appellant was identified by the complainant as her uncle and therefore it was identification by recognition and that the Appellant raised the issue of examination too late in the proceedings.

6. This being a first appeal, the Court is required to re-evaluate evidence tendered before the trial Court as I herein do. PW1 TW who was found to possess sufficient knowledge and intelligence to understand the extra responsibility of telling the truth, testified on oath and stated that she was nine years and that on the material day while washing utensils, the Appellants who she knew as Sammy at the plot came and asked her for tea which she gave him. He then removed her pants and did bad manners to her. He then promised to buy her a toy motor bike or give her money. He then threatened to kill her with a knife if she told anyone. She reported to her grandmother and was referred to the hospital before the Appellant was arrested.

7. PW2 the complainant's mother stated she had left the complainant while going to her mother's place. She later joined them crying and told them that the Appellant had followed her to the house and raped her. The complainant described the Appellant as the "M called S who usually come to our place" and from it she knew that it was the Appellant who was her brother in law. In cross examination she denied that she was stopping the Appellant from sale of the family land.

8. PW3 Naomi Muthoni Wachira a Clinical Officer produced the P3 form and noted that on examination of the complainant, there was tenderness on the labia, laceration and tear of the vagina with hymen missing and formed conclusion that she had been defiled. She stated that she did not examine the Appellant. PW4 APC Stephen Mwangi Nganga received the report and arrested the Appellant. In cross examination he confirmed having not investigated the matter before arresting the Appellant and did not take him for examination. PW5 APS Daniel Mugi corroborated the evidence on the arrest, while PW5 Corp. Josec Bonuke investigated the matter and recorded witness statements. He stated that they could not take the Appellant for examination because he was violent.

9. When put on his defence the Appellant stated that when he was arrested he was in Mihango fixing his motor bike and as he was with his wife. He saw the police and the complainant's mother before he was arrested. He tried to explain himself and offered to be examined but was not. He stated that the he was

framed because the complainant's mother had a boyfriend and he had threatened to report her to her husband who was his brother and she threatened him.

Determination

10. From the proceedings and the submissions herein, I have identified the following issues for determination:

    a. Whether *Voir dire* was conducted.

    b. Was there need for the Appellant to be subjected to DNA examination?

    c. Was the prosecution case proved to the required standard?

    d. Was the defence of the Appellant considered?

    e. Was the sentence lawful?

    f. What order should the Court make herein?

11. On the issue of Voir dire, the record clearly shows that before taking the evidence of the complainant, the Court conducted examination of the same and made the required finding that she was intelligent enough to give sworn statement and as was stated by the Court of Appeal in *Japheth Mwambire Mbitha v Republic* [2019] eKLR, the purpose of Voir dire is to ensure that the minor understands the solemnity of oath and if not at the very list the importance of telling the truth which was in this case. I therefore find no merit on the Appellant's submissions that the same was not conducted through the two stage and dismiss the same.

12. On the need to subject the Appellant for DNA examination, I take the view that there is no legal requirement to subject the same to examination under Section 36(1) of the Act, provided that the critical ingredients forming the offence as per *Dominic Kibet Mwareng v republic* [2013] eKLR, of age, penetration and identification are proved beyond reasonable doubt. This ground of appeal fails too.

13. On the proof of the case, the age of the complainant was not disputed. It was proved through the production of treatment notes which placed her age at 7 years P3 form dated 14th July 2016 at 8½ years, her evidence on 25th July 2017 that she was 8 years and find that age was proved. Penetration was also proved through the evidence of the complaint to wit the Appellant "removed his urinating thing and put it in my urinating thing". She then went to her grandmother's place crying and in pain, which was corroborated through the evidence of PW3 the Clinical officer and find no fault with the trial Court holding thereon.

14. On the identification of the Appellant, the same was identified through recognition, the complainant described him to her mother as SM who used to come to their place. He was arrested soon thereafter and his defence of grudge between him and the complainant's mother was analysed by the Court who found as a fact that it is the complainant who reported to the mother, her grandmother and Aunt as a sign of not being under any pressure to just name anybody. It is also clear that the Appellant's allegations of the grudge were not consistent for on one hand it was over the sale of family land and on the other hand it was over the alleged infidelity on the part of the complainant's mother. I further find and hold that the Appellant defence was considered and rightly rejected on the strength of the evidence on record.

15. I therefore find and hold that the prosecution case against the Appellant was proved to the required standard and his conviction was safe and free from error and therefore dismiss the appeal against conviction.

16. On sentence, the same remains at the sole discretion of the trial Court which can only be interfered with on appeal if and when the same was issued in error. In sentence the Appellant herein, the trial Court though held that the sentence provided for was mandatory in line with the decision of Muruatetu 2. Since that time there have been conflicting decisions of the Superior Courts on the place of mandatory nature of the sentences in respect of sexual offences and the jury is still out.

17. In *Maingi & 5 Others v DPP* [2022] KEHC 13118 (KLR) the High Court held that whereas the sentence prescribed may not be necessarily unconstitutional in the sense that they may still be imposed in deciding what sentence to impose, the Court had to ensure that whatever sentence was imposed upheld the dignity of the individual under Article 28 so long as the same was not deemed to be mandatory minimum.

18. In *WOR v Republic* [2022] KEHC 412 (KLR) the High Court once again was of the considered view and held if the mandatory nature of death penalty was declared unconstitutional, then similar reasoning can extend to mandatory sentences such as those in Section 8 of the *Sexual Offences Act* and proceeded to set aside the same.

19. The Court of Appeal in *Kamusyi Ngulu v Republic* [2020] eKLR held that the Courts will uphold sentences prescribed by the *Sexual Offences Act* if upon exercise of discretion and consideration of the facts of each case such sentence is arrived on merit.

20. The same Court of Appeal has in the case of *Julius Kitsao Manyeso v Republic* Criminal Appeal no 12 of 2021 Court of Appeal at Malindi (unreported) held that the reasoning of the Supreme Court in *Francis Karioko Muratetu & Another v Republic* [2017] eKLR applies to the imposition of a mandatory indeterminate life sentence and proceeded to substitute the life imprisonment in respect of the Appellant who had defiled a four (4) year old child with a forty (40) years imprisonment.

21. Until such a time that the supreme Court shall set the law once and for all, the Courts shall continue in this confusion and for avoidance of doubt, I take the view that any sentence which does not give the Court discretion to decide based upon the circumstances of each and which requires the Courts to be robotic in nature will be frowned upon by all Courts including yours truly.

22. In therefore acting mechanically in imposing this sentence, in view of the Court of Appeal decision herein, I would reluctantly allow the appeal on sentence which I hereby set aside. Having taken into account the age of the victim who was 8 ½ years at the time, the fact that the Appellant stood in position of loco -parenti as an uncle who used to visit her home and who pretended to belong to the MF, I have come to the conclusion that deterrence sentence is the most suitable in the circumstances of this case.

23. With the decision of the Court of Appeal herein above in mind I am of the considered opinion and hold that a sentence of fifty (50) years would be adequate and appropriate.

24. In the final analysis the appeal herein is dismissed and conviction is dismissed but the appeal on sentence is partially allowed and the life imprisonment is substituted with a sentence of fifty years to run from the 18th of July 2016 when he first appeared in Court in view of the provision of Section 333(2) of the *Criminal Procedure Code* and it is ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 27th DAY OF JULY 2023

J. WAKIAGA

JUDGE

In the presence of:

Ms Gakumu – ODPP

Jackline – Court Assistant