Kariuki v Republic (Criminal Appeal E070 of 2022)
[2023] KEHC 21346 (KLR) (9 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21346 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E070 OF 2022

LM NJUGUNA, J

AUGUST 9, 2023

BETWEEN

MORRIS MUGAMBI KARIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal arising from the decision of Hon JW Gichimu in Senior Principal Magistrate's Court at Runyenjes Sexual offences No E008 of 2021 wherein the appellant faced the charge of defilement contrary to Section 8(1) as read together with Section 8(3) of the *Sexual Offenses Act* No 3 of 2006. The particulars of the offence are that on an unknown day in November 2020 at around 1100hrs in Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of CWK a child of 15 years. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006 whose particulars are that on an unknown day in November 2020 at around 1100hrs in Embu County, the appellant intentionally touched the vagina of CWK a child aged 15 years with his penis.

2. The appellant seeks orders that the appeal be allowed and that the judgment, delivered on December 16, 2021, conviction and sentence by Hon JW Gichimu (SPM) in Runyenjes SPMC Sexual Offence No E008 of 2021) be quashed and/ or set aside and in its place an order acquitting the appellant be made. The appeal is premised on the following grounds:

    a. THAT the Learned trial Magistrate erred in law and in fact by convicting the accused on uncorroborated and doubtful evidence;

    b. THAT the Learned trial Magistrate erred in law and in fact by convicting the appellant against the weight of the evidence;

c. THAT the Learned trial Magistrate erred in law and in fact in failing to consider the appellant's defense of alibi;

d. THAT the Learned trial Magistrate erred in law and in fact by basing his judgment on fabricated evidence; and

e. THAT the Learned trial Magistrate erred in law and in fact by sentencing the appellant to the mandatory minimum sentence.

3. At trial, the accused person entered a plea of not guilty and the prosecution called 4 witnesses in support of the prosecution's case.

4. PW1 was the minor in question who testified on oath identifying the accused person in court as the perpetrator of the crime. She stated that on the day of the incident, the accused person went to their home and asked her to escort him. That when she asked him what he wanted from her, he told her that he wanted to have sex with her. That she told him she is still a child. That the accused person led her into an incomplete building, forced her to the ground and inserted his penis into her vagina against her wishes. That she screamed for help but nobody was around the vicinity. That when she went back home, she did not tell anyone of the occurrence until when her mother noticed that she (PW1) had missed her periods. That she was found to be pregnant when her mother took her to hospital. That the case was reported to the police when the chief advised her to do so after one of PW1's teachers followed up on her absence from school. On cross-examination, PW1 stated that when she informed her mother about the incident, the mother did not take any action. She further confirmed to the court that she was pregnant and was due to deliver in August 2021.

5. PW2, RM who is the mother of PW1 stated on oath that when she noticed that PW1 had missed her periods in December 2020 and January 2021, she (PW2) escorted her (PW1) to hospital where it was determined that she was pregnant. That PW1 told PW2 that it was the accused person who impregnated her when he asked her to escort him but he defiled her. That after this she reported the matter to the police. That she took PW1 back to school but she could not continue with her studies because she was being ridiculed by other students.

6. PW3 was PC Sharon Kaboskei who was the investigating Officer in the case and she stated that on June 10, 2021 a report was made at Nthagaiya Police Post by PW1 and PW2. That PW1 said she had been defiled by the accused person, who was arrested on June 12, 2021 and he was arraigned in court. That PW1 stated that the accused person went to their home and defiled her then told her not to tell anyone. On cross examination, she stated that the offence was reported to have occurred in November 2020 and she would not know if PW1 consented to the sexual act.

7. PW4 is Dennis Mwenda, a clinician at Runyenjes Level 4 Hospital. He stated that he is the one who filled the P3 form for the complainant who was a minor. That she was 30 weeks pregnant and had a perforated hymen that had healed scars. That there was a whitish discharge due to pregnancy. He produced P3 and PRC forms marked as PEX1 and PEX2 respectively. He stated that he requested for a paternity test after delivery. On cross examination he stated that the complainant said that the accused person had sexual intercourse with her.

8. After the close of the prosecution's case, the accused person was put to his defense and he made an unsworn statement. He stated that he was a casual laborer employed at Ugweri as a meat vendor. That on the material day he was at work and he is surprised that he had been charged with the offence which caused him to lose his job. He confirmed that he was arrested in June 2021.

9. The accused was found guilty of the offence and convicted under section 215 of the *Criminal Procedure Code* and was sentenced to serve 20 years in prison.

10. In this appeal, both parties filed their submissions. The appellant's submissions rehashed the position held by the court in the cases of *Dpp v Woolmington, (1935) Ukhl 1* and *Miller Vs Ministry of Pensions [1947] 2 ALL ER 372* that the burden of proof lies with the prosecution to prove the offence beyond any reasonable doubt. That in as much as the age of the minor and penial penetration resulting in the pregnancy of the deceased were proven, the prosecution failed to link the offence directly with the appellant. It was the appellant's averment that the pregnancy could have been by someone else besides him, especially because the offence was only reported to the police 7 months after it allegedly happened. It was also his case that it seems as though the offence was only reported after the complainant found out that she was pregnant.

11. The appellant submitted that the evidence adduced in the case was doubtful and that the only thing that would link the accused person to the offence is a DNA test which was never conducted even though PW4 recommended it. That the trial court ought to have invoked the provisions of Section 36 of the *Sexual Offences Act* given the circumstances of the case. That it is not for the appellant to prove that he is not the father of the child but rather, the onus is on the prosecution to prove that the appellant is the father of the child.

12. He further submitted that section 124 of the *Evidence Act* and Section 19 of the *Oaths and Statutory Declarations Act* ought to have been applied and that the evidence of the minor should have been corroborated. That the court should have conducted voire dire notwithstanding that PW1 was also the complainant and a child who cannot be categorized as one of tender years. Reliance was placed on the cases of *Kibangeny Arap Korir Vs Republic, [1959] EA 92*; P*atrick Kathurima Vs Republic, [2015] eKLR* and *Maripett Loonkomok Vs Republic [2016] eKLR* which authorities were cited with approval in the case of *Kenneth Muchomba -Vs- Republic [2021] eKLR*) wherein the court defined 'tender years' and the circumstances under which the requirement for corroboration can be dispensed with. That the evidence of PW4 was not corroborative to the evidence by PW1 and that the only thing linking the appellant to the alleged defilement is the pregnancy.

13. It was the appellant's submissions that even if corroboration was not required, there were no sufficient reasons as to why the court believed the evidence of the victim. On this, reliance was placed on *Mercy Chelangat -Vs- Republic [2022] eKLR*). That the trial court failed to consider the appellant's defense of alibi and the alibi was not sufficiently interrogated in order to place the appellant at the scene of the crime. He relied on the cases of *Okeno Vs Republic [1972] EA 32* and *Kiilu & Another Vs Republic [2005] 1KLR 174* where the courts held that the evidence tendered in a trial court must be examined exhaustively before conclusions are drawn.

14. He relied on the case of *Francis Karioko Muruatetu & Another Vs Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR* (Muruatetu 2) in support of his case that the trial court erred in subjecting the appellant to the mandatory minimum sentence. He also urged the court to call for a presentencing report with the aim of resentencing him. On this he relied on the case of *Phillip Mueke Maingi & 5 Others -Vs- DPP & another – Machakos High Court Petition No. E017 of 2021* where the court held:

> ' 2) Taking cue from the decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at

liberty to petition the High Court for orders of resentencing in appropriate cases.'

15. In its written submissions, the respondent stated that the court indeed considered the evidence of PW1 having been corroborated by PW2 and PW4 thereby connecting the appellant to the offence and that on this strength, the court convicted the appellant. They relied on the case of *JWA Vs Republic (2014) eKLR* where the court held that corroboration is not mandatory in sexual offences if the trial court is satisfied of the credibility of the complainant. They further relied on section 124 of the *Evidence Act* to affirm that corroboration was not mandatory in the instant case as the victim is not a child of tender years.

16. The respondent further submitted that all the requirements to aid in convicting the appellant were met as outlined in the cases of *Geoffrey Amkwach Vs Republic (2018) eKLR* and *Peter Muasa Vala Vs Republic (2015) eKLR* wherein the case of *Aml Vs Republic (2012) eKLR* was cited and the court held that the offences of rape or defilement are not proven by DNA testing but by evidence. On the issue of alibi, the respondent submitted that the defense ought to be brought before the court at the earliest possible opportunity as was held in the case of *Republic Vs GNK (2017) eKLR.*

17. On the issue of severity of the sentence, the respondent cited section 354(3)(b) of the Criminal Procedure Code and submitted that the appellate court should not interfere with the sentence of a trial court unless the same was reached based on wrong principles as was held in the case of *Wilson Waitegei Vs Republic (2021) eKLR*. Further in defending the sentence issued by the trial court, the respondent relied on the orbiter of the court in the case of Muruatetu & another Vs Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 where it was stated:

> ' It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.'

18. From the evidence and competing submissions, the issues for determination are as follows:

    a. Whether the evidence of PW1 should have been corroborated at the trial;

    b. Whether or not the elements of the offence of defilement were proven beyond reasonable doubt;

    c. Whether or not the defense of alibi should have been considered at trial; and

    d. Whether the appellate court should depart from the mandatory minimum sentence applied by the trial court.

19. On the first issue of whether the testimony of PW1 ought to have been corroborated at trial, the term 'corroboration' was defined in the Nigerian case of *Igbine Vs The State (1997) 9 NWLR (Pt.519) 101 (a), 108* as follows:

> ' Corroboration means confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses'.

20. Section 124 of the *Evidence Act* provides:

> ' Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap 15), where the evidence of the alleged victim is 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 material 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.'

21. The above-cited section gives the prerequisite for corroboration of evidence given by children of tender years. However, the proviso strongly comes into play in the instant case given that it provides for an override of the requirements where there is a sexual offence in question. That is to say, where the court is faced with determining a charge in the nature of a sexual offence, the requirement for corroboration of the minor's testimony is waived. The trial court was satisfied that the minor, who is not of tender age, was telling the truth and therefore convicted the appellant. This does not mean that the court applies itself haphazardly in this manner. In the case of *Bernard Kebiba Vs Republic [2000] eKLR* the court held:

> ' The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation, however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result.'

In the premises, it is my view that the trial court made no error in convicting based on uncorroborated evidence in this case.

22. On the second issue which is closely related to the first issue, on whether the elements of the offence were proven beyond reasonable doubt, I shall refer to Sections 8(1) and (3) of the *Sexual Offences Act* provides:

> ' (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) .
>
> (3) 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.

(4) .'

23. For a conviction to be made for offences under section 8(1) and (2) of the *sexual Offences Act*, the prosecution has the task of proving the following beyond reasonable doubt:

    a. The age of the complainant- that the complainant was a child;

    b. Penetration as defined under section 2(1) of the *Sexual Offences Act* happened to the child;

    c. The perpetrator was positively identified.

24. The victim was confirmed to be a child within the meaning set out in section 2 of the Children's Act No 8 of 2001 through her birth certificate produced as PEX1 which shows that she was born on April 30, 2006 while the date of the offence is recorded as November 2020, thereby proving that the victim was 14 years old when the incident occurred.

25. PW4 produced P3 and PRC forms confirming that there was indeed penetration with perforated hymen that had healed scars. The victim was also 30 weeks pregnant at the time. It was his recommendation that a paternity test be carried out when the victim delivers the baby. There is no record to show that samples were taken for purposes of a paternity test, neither did the prosecution follow up on this. It is the appellant's argument that section 36 of the *Sexual Offences Act* ought to have been invoked to allow the court a chance to truly verify that the appellant committed the offence and is indeed he is the father of the child. As correctly submitted by the appellant, the burden of proof never at any point shifts to the accused person.

26. However, and before I sum up my previous point, I do note that with reference to my findings on admissibility of sworn testimony by the complainant, which testimony did not need any corroboration, it is my view that the appellant was rightly identified by PW1 as the offender as he was her neighbour and was well known to her. Further the incident happened during the day and therefore the issue of mistaken identity cannot arise. This means that if section 36 of the *Sexual Offences Act* was to be invoked, it would be towards corroborating the evidence of PW1. To that end, I am satisfied that the elements of the offence were proven to the required degree and I do not find a reason to interfere with the findings of the trial court.

27. On the third issue of the defense of alibi raised by the appellant at trial, I note that the same was raised too late in the day and could not serve to benefit the case, let alone change the outcome. In the case of Mercy Chelangat Vs Republic (supra) the court stated:

> ' The Appellant raised the defense of alibi as one of the grounds of her Appeal. I have keenly perused the record of the trial court and noted that there was nothing on the Record that he mentioned about an alibi during the material night. In addition, this defense was never raised at the onset of the trial much less anywhere during the trial. It is trite that the defense of an alibi must be raised at the earliest opportunity by an accused person during a trial to enable the prosecution look into the same and verify whether the trial ought to proceed or be stopped because such a trial would be superflous in the event that the accused person cannot be placed at the scene of crime at the material time. The former Eastern Africa Court of Appeal case of Republic vs Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA, 145 gave the necessary guidance on this as follows:
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> 'If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing in the interval,

and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.'

28. On the final issue of the correctness of application of the mandatory minimum sentence, the appellant relied on the case of Phillip Mueke Maingi & 5 Others -Vs- DPP & another – Machakos High Court Petition No E017 of 2021 in which, the court sought direction on sentencing from the decision of the Supreme Court in the case of Francis Karioko Muruatetu & Another Vs Republic [2017] eKLR (Muruatetu 1). Conversely, the respondent cited the later decision in the case of Muruatetu & another Vs Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (Muruatetu 2) where the supreme court cautioned against the overzealous application of the principles laid down therein as they were limited to the circumstances of the appellants in that case. Both cases have guided the courts on the unconstitutionality of mandatory minimum sentences, and this court also welcomes the sentiments of the supreme court.

29. In the case of *Athanus Lijodi Vs Republic[2021]eKLR* the court held thus:

> ' On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance Evans Wanjala Wanyonyi Vs Republic [2019] eKLR). Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited. This Court expressed the proposition as follows in David Wafula Kilwake & Another Vs. Republic [2018] eKLR.
>
> 'We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the Society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it.'

30. In the premises, I find it appropriate to depart from the sentencing of the trial court and apply discretion on the matter. I therefore set aside the mandatory minimum sentence of 20 years and substitute the same with 12 years imprisonment to run from the date when the trial court imposed its sentence.

31. It is so ordered.

Delivered, dated and **signed** at **Embu** this **9th** day of **August, 2023.**

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent