WBN v Republic (Criminal Appeal 55 of 2018)
[2023] KEHC 22934 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22934 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 55 OF 2018

LM NJUGUNA, J

SEPTEMBER 29, 2023

BETWEEN

WBN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. L.W. Kabaria (SRM) in the Principal Magistrate's Court at Gichugu Sexual Offence No. 20 of 2018 delivered on 11th October 2018)

JUDGMENT

1. The appellant, vide the amended memorandum of appeal filed on the 11/7/2023, prays that the appeal be allowed, conviction quashed and sentence be set aside. The grounds of the appeal are that the trial magistrate erred in law and fact by:
    a. Failing to consider that there was a disagreement between the appellant and PW1;
    b. Failing to consider that the prosecution evidence was contradictory and uncorroborated;
    c. Convicting the appellant on the evidence of a clinical officer, which evidence was not done in the required manner;
    d. Failing to consider that the sentence was excessive and harsh; and
    e. Filing to consider the appellant's defense.
2. The appellant was faced with the first count; being the charge of defilement contrary to Section 8(1) as read together with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that, on diverse dates in June 2018 in Kirinyaga East Sub County within Kirinyaga County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SWB a child aged 4 years.

3. The second count was a charge of incest contrary to section 20(1) of the *Sexual Offences Act* no. 3. Of 2006 whose particulars are that on diverse dates in June 2018 in Kirinyaga East sub county within Kirinyaga County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SWB who was to his knowledge his daughter aged 4 years.

4. 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. The particulars of this charge were that on diverse dates in June 2018 in Kirinyaga East sub county within Kirinyaga County, the appellant intentionally and unlawfully did cause his penis to come into contact with the vagina of SWB a child aged 4 years.

5. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called 5 witnesses in support of its case.

6. PW1, TWN, a teacher a [Particulars Withheld] Primary School stated that on 04th June 2018 she noticed that the complainant was acting funny and showing other pupils how sex is done. That a few other male pupils also reported to her that the victim had been touching their genitals, an act which she also witnessed. That the victim had trouble settling down in class and went to the toilet frequently. That PW1 asked the complainant and she said she had been defiled by her father. That PW1 reported the matter to the police station where she was directed to take the victim to hospital for examination and treatment. That at the hospital some tests were done and the minor was examined, following which P3 and PRC forms were filled. That she knew the appellant as the father of the complainant as he was the one who took her to school and registered in the school records that he was her father. On cross-examination she stated that there was no grudge between her and the appellant.

7. PW2 was the complainant who gave unsworn testimony following voire dire. She stated that the appellant had defiled her on his bed. That where she slept there is no mattress and that the appellant went to where she was sleeping and removed his clothes and inserted his penis into her vagina. On cross examination, she stated that she never slept on her parent's bed and that she only heard about sex from people saying the word in kikuyu language. That when her mother was not at home, she stayed alone.

8. PW3 Hezron Macharia Maina, a clinical officer at Kerugoya County Hospital stated that he examined the victim who was allegedly sexually assaulted by a person well known to her. That on examination, there were injuries on her genitalia with multiple bruises that were healing and a perforated hymen. That there was no active bleeding and the injuries occurred approximately two weeks before the examination. That the victim was treated and given antibiotics, analgesics and psychological counselling and then P3 and PRC forms were duly filled and produced in court. That he relied on age assessment report which shows that the victim was 4 years old. On cross-examination, he stated that it was possible for a defilement victim to attend school depending on the severity of the injuries sustained. That from his examination, it is most likely that the injuries were inflicted by an adult assailant.

9. PW4, P.C. Shadrack Muthoka of Kutus Police Patrol Base stated that on 06th June 2018, he received a report by PW1 of alleged defilement. That he went to the home of the appellant and arrested him as a suspect. That he also took statements from witnesses on the same day and the victim told him that her mother was a drunkard and that her father took advantage of that and defiled her repeatedly. That he escorted the minor to Embu Level 5 hospital for age assessment and it revealed that the minor was four years old. The court allowed him to produce the age assessment report as the maker of the report was unavailable.

10. PW5, JM is the deputy head teacher at [Particulars Withheld] Primary School and she stated that on 06th June 2018, PW1 went to her office and reported that PW2 was behaving unusually and it might be a cause for concern. That PW1 had been observing PW2 for two days. That PW5 called for PW2

and heard the story from her. Then she (PW5) reported the matter to the chief who advised her to report to the police which she did. That PW1 took the child to Kutus Police Base and then to hospital for examination. That the child was taken to hospital the following day after reporting because the working day of the teacher escorting her had ended.

11. At the close of the prosecution's case, the appellant was placed on his defence after the trial court found that he had a case to answer.

12. DW1 stated that he was away in Mwea from 01st June 2018 for one week and on 05th June 2018 he returned to his family. That he was arrested and he thought it was about the debt he owed PW1 which he had been unable to pay. That he was later told by the police that this was a case of defilement as reported by PW1. He denied committing the offence and stated that when he took the complainant to school he had paid all her fees and bought her new uniform. That he was even making plans for her future education.

13. At the close of the defense case, the court gave its judgment finding the appellant guilty of the first count. He was sentenced to life imprisonment.

14. The parties on appeal were directed to file their written submissions and they both complied.

15. The appellant submitted that the sentence meted was too harsh and excessive and against the provisions of Articles 25(a) and 28 of *the Constitution* of Kenya 2010. He also cited the case of *Simon Ndichu Kahoro Vs. Republic* (2016) eKLR. He stated that there is a grudge between him and PW1 over a debt that he has been unable to pay. That the evidence of PW2 should not have been relied upon as it is contradictory and that the appellant did not do anything to her. He relied on the case of *Mary Wanjiku Gichira Vs. Republic* (1998) eKLR to the effect that suspicion was not enough to convict and that the prosecution failed in proving their case in this regard beyond reasonable doubt.

16. In refuting the evidence by the clinical officer, the appellant submitted that there was no way 4-year-old who was defiled would be able to go to school the following day. Further, that no DNA evidence was adduced. That the prosecution failed to call key witnesses like the mother of the minor and her classmates to clarify any doubts in the case. That the court was unfair to him because his alibi defense was not considered. He placed reliance on the cases of *Philip Mueke Mwangi Vs. Republic* (2021) eKLR and *Edwin Wachira Vs. Republic* (2021) eKLR in urging the court to consider reviewing the sentence. He cited the case of *Pandya Vs. Republic* (1957) eKLR to remind the court of its appellate power.

17. The respondent submitted that the case was well investigated and that the court applied the relevant law appropriately. That the elements of the offence have been proved by the prosecution beyond reasonable doubt and that the chain of evidence presented by the prosecution is consistent, unequivocal and unshaken. That if any inconsistencies existed in the case, they are not the basis of rejecting evidence as was stated in the case of *Twehangane Alfred Vs. Uganda* Criminal Appeal No. 139/2001(2003) UGCA.

18. From the memorandum of appeal and the , submissions, it is my view that the issues for determination are as follows:

    a. Whether the prosecution has proved the case beyond reasonable doubt;

    b. Whether the evidence was contradictory and required corroboration;

    c. Whether the alleged grudge between PW1 and the appellant should be considered; and

    d. Whether the sentence meted out was appropriate in the circumstances.

19. Under Section 8(1) and (2) of the *Sexual Offences Act*, the prosecution had the task of proving the following elements beyond reasonable doubt:

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

    b. Penetration happened; and

    c. The perpetrator was positively identified.

20. The age of the complainant is not in question because an age assessment was conducted and a report produced in court to ascertain that the victim was 4 years old. In this case, a birth certificate was not available for reference but the age assessment report was admitted as evidence which guided the court.

21. On the element of penetration, the court was guided by the testimony of PW2 who stated that the appellant had defiled her by inserting his penis into her vagina. That he did the act at night and she told her mother but the mother did not do anything about it. Her testimony was corroborated by the testimony of PW3, the clinical officer, who produced P3 and PRC forms which were filled after he examined PW2. He confirmed that indeed PW2 had been penetrated by an adult assailant within the past 2 weeks prior to the examination. He stated that the hymen was broken and there were injuries that were healing. PW1 also stated that PW2 said that she had been defiled by the appellant and when she and PW5 tried to look at PW2's painful private parts, they noticed that the parts were not looking normal. This was also corroborated by the findings of PW3. I am satisfied that the element of penetration has been sufficiently proved.

22. On identification of the assailant, PW2 stated that the assailant was the appellant whom she referred to as "baba". The trial court believed the testimony of PW2 to be true, following the proviso at section 124 of the *Evidence Act* which provides:

> "……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."

23. The main testimony on identification of the assailant, in this and many cases of this nature, is usually the victim. PW2 stated that the appellant went to where she was sleeping, removed her clothes and inserted his penis into her vagina. The injuries to the victim's private parts were about 2 weeks old per the testimony of PW3. On the other hand, the appellant's alibi only accounts for the period between 01st to 05th June 2018 when he was allegedly in Mwea for work. The victim was examined by PW3 on 07th June 2018. In my view, the appellant is placed at the scene of the crime within the time frame of occurrence of the offence, going by the testimony of PW2 and PW3. The court also notes that the appellant is the father to the complainant and therefore well known to him. In the case of *Wamunge Vs Republic*, (1980) KLR 424 it was held;

> "It is trite law that where the only evidence against a defendant evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it a basis for conviction"

24. On whether there were inconsistencies in the evidence, it is my view that the main elements of the offence have been sufficiently proven beyond reasonable doubt. I notice that there were lapses in the testimony of PW2, however, I do not think these shortfalls affect the substance of the case itself. In the

case of *Erick Onyango Ondeng' Vs. Republic* [2014] eKLR the Court of Appeal cited with authority the Ugandan case of *Twehangane Alfred Vs. Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6 where it was held:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

25. On the existence of a grudge between PW1 and the appellant, the appellant stated that when he was arrested and taken to the police vehicle, he found PW1 inside the police vehicle and he thought that the arrest was about a debt he owed PW1 that he had not been able to pay. While it may be true that PW1 was owed money and would have wanted the same repaid, I find no connection between that debt and defilement of the child. In my view, though a grudge would cause PW1 to implicate the appellant as the assailant, in this case, the issue seems distant because PW1 discovered the defilement in the course of her work as a teacher to the victim. I would assume that even if she was not in the position of the victim's class teacher, any other teacher who observed the behavior of the victim in class would have probably made the same conclusions that PW1 made. The argument on grudge does not hold water.

26. The appellant has decried the sentence meted out to him as harsh and excessive. The trial court simply applied the mandatory minimum sentence as provided for under section 8(2) of the *Sexual Offences Act* no. 3 of 2006. However, I am at liberty to be guided by the Supreme Court's decision on unconstitutionality of mandatory minimum sentences in the case of *Muruatetu & another Vs Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (Muruatetu 2). This decision was later applied in the case of *Athanus Lijodi Vs Republic* (2021) eKLR where the court when faced with circumstances similar to those before me today, 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.
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> > "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."

27. Therefore, I cautiously apply the sentiments in Muruatetu 2 and review the sentence downwards.

28. In the end, having considered the petition of appeal, the written submissions by both parties, relevant case law, I do find that the appeal partially succeeds on sentence and I make the following orders:

    a. The trial court's finding on conviction is hereby upheld; and

    b. The sentence of life imprisonment is hereby set aside and the appellant sentenced to 40 years imprisonment running from the date when the trial court imposed its sentence.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent